CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

HEARINGS

BEFORE THE

SUBCOMMITTEE ON RULES OF THE HOUSE

OF THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

VARIOUS LEGISLATIVE VETO BILLS INTRODUCED IN THE 97TH CONGRESS

OCTOBER 7, 28, AND NOVEMBER 19, 1981

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CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

WEDNESDAY, OCTOBER 7, 1981

House of Representatives,
Subcommittee on Rules of the House,
Committee on Rules,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room H-313, the Capitol, Hon. John Joseph Moakley (chairman of the subcommittee) presiding.

Present: Representatives Moakley, Beilenson, Hall, Rhodes, and Taylor.

Mr. Moakley. The committee will now come to order.

OPENING STATEMENT OF HON. JOHN J. MOAKLEY, CHAIRMAN OF THE SUBCOMMITTEE ON RULES OF THE HOUSE

Mr. Moakley. Today the Subcommittee on Rules reopens its investigation of the legislative veto. In the last Congress, the subcommittee undertook an intensive study of this controversial issue. It is my hope that the hearing record and reports developed during that time will serve as a foundation and data base for our current study. In the next few weeks, I intend to provide an opportunity for both the proponents and opponents to present their views before the subcommittee begins its deliberation.

The issue of the legislative veto is a perennial one. The term has become an accepted entry in the congressional lexicon, easily comprehended despite its many variations and permutations. Yet the issue is also timely. For many of our colleagues, the legislative veto is an essential addition to the regulatory reform package which is to serve as part of the administration's economic recovery program. Indeed, one of the variations of the veto contained in the Foreign Military Sales Act has received considerable press attention in connection with the administration's proposed sale of AWACS to Saudi Arabia.

There are, of course, approximately 272 forms of congressional review provisions contained in over 193 different statutes. Unfortunately, no two are quite alike. Some would restrict Presidential initiatives in the foreign policy area. Others would subject Government reorganization plans to congressional approval, while still others would permit congressional committees to supervise the spending of moneys for public works projects.

Nonetheless, simply because forms of the legislative veto may be necessary and reasonable exercises of congressional authority in certain discreet areas, we must not conclude that the mechanism is either constitutional or good public policy in all others.

The bills which we are considering today contain generic legislative vetoes. Each in its own way would subject most rulemaking initiatives of the Federal Government to the veto of Congress either by the action of one House, or by one House with the implied concurrence of the other, or by both Houses. Each of these bills has been introduced by Members for whom I have the deepest respect and highest regard. Indeed, my admiration of them has grown enormously since my own subcommittee has undertaken its investigation of agency rulemaking.

The legislative veto has been heralded by many as a method of bringing political accountability to the regulatory activities of the Federal Government. But the question that I think we must ask ourselves is "When should that accountability begin?" To my mind the answer must be that our legislative responsibility commences from the moment statutes which regulate the conduct of the public are conceived.

So many of our problems with excessive Government regulation can be traced to poorly drafted and ambiguous legislation. Indeed, probably the greatest contribution which the Supreme Court could make to the principle of separation of powers would be to revive the nondelegation doctrine by which any grant of legislative authority without sufficient guidelines would be considered unconstitutional.

While legislative responsibility and accountability begins in statutory drafting, it must also continue vigilantly during oversight. My good friend and colleague, Gillis Long, chairman of the Subcommittee on the Legislative Process, has recently undertaken the difficult task of examining methods to improve the oversight activities of Congress.

From the hearings which our colleagues have held, we have all become more conscious of the overwhelming and seemingly insurmountable problems which prevent effective oversight. Certainly any effort which is made to enhance our ability to organize and to manage our congressional responsibilities deserves our full support. The overall program review approach taken by Congressmen Long and Derrick and others recognizes the important principle that congressional power can often be dissipated when it is used simply to respond to the initiatives of the executive branch. This lesson is one which we should keep in mind considering the legislation before us.

At the beginning of this Congress, I introduced my own bill, H.R. 1, which differed from other regulatory reforms bills in that it proposed the creation of a Select Committee on Regulatory Affairs. My suggestion came as a logical outgrowth of the recognition that much of the problem with Government regulation stems from overlap, duplication, and outright conflict among various regulatory schemes. Although comparisons were made to the Budget Committee, my intention was not to create a supercommittee; rather, by drawing membership from various standing committees with regulatory jurisdiction, I intended to provide a forum, a microcosm of the committee structure of the House, with little or no legislative authority, which could assist the House in assessing regulatory priorities. By serving as an adjunct to other committees and by establishing an information conduit for numerous Federal regulatory programs, the Select Committee would make it less likely that the House would enact regulatory legislation in a vacuum, unaware of its potential domino effect on other regulatory schemes.

I have on many occasions voiced the opinion that the legislative fate of the congressional veto should not depend upon the constitutional arguments. The legal points raised by the proponents and opponents are equally convincing and can only be disposed of by the Supreme Court. Notwithstanding the important legal question discussed in this debate, our overriding concern must be public policy. Indeed, how clearly we define these policy issues may well predetermine the judicial outcome.

My other concern in approaching our study of the legislative veto is to consider carefully its effect on related legislation. The regulatory reform bill which is now being marked up under the able direction of our colleague George Danielson of the Subcommittee on Administrative Law will make dramatic improvements to the procedures by which Government regulations are drafted.

We must be careful not to consider legislative review mechanisms with tunnel vision lest we undo the gains achieved through overall regulatory reform legislation. If we make the informal rulemaking process of our regulatory agencies more politically responsive and more attuned to our economic realities, we must not at the same time create an incentive for agencies to abandon rulemaking and to enforce their legislative mandates through case-by-case adjudications, in an effort to avoid the veto of the Congress. All of these issues must be carefully weighed during the hearings which we undertake today.

Despite any personal reservations which I may have voiced in the past, I have come to recognize the validity of many of the arguments raised by the proponents of the generic legislative veto. One compelling argument in favor of its enactment is that it would bring some uniformity to the confusing mass of conflicting provisions applicable to congressional review of Executive activities.

Another consideration is the number of Members who have cosponsored the bills before the subcommittee and who now constitute a majority of this House. As long as these Members have been made aware of the potential negative impact of this legislation, due consideration should be given to providing them with an opportunity to express their opinion.

I have also realized that many of those who have opposed the veto in the past have taken note of the changing political climate. Some have conceded that a flexible, expeditious procedure may be necessary if Congress is to respond adequately to Presidential initiatives in the regulatory area.

Today we are fortunate to have with us a representative from the administration, Ted Olson, Assistant Attorney General and Chief of the Office of Legal Counsel. I know the administration has given this issue serious thought and consideration and we are all looking forward to hearing the administration's views, not only on the constitutional questions, but also on the policy issue. Representatives from the public interest group, Congress Watch, will also be testifying.

Alan Morrison is the director of the litigation group and has represented the public interest sector in both the *Chadha* and *FERC* cases which challenged the constitutionality of the veto. He is accompanied by Carolyn Brickey, a staff attorney with the litigation group.

We are also pleased to welcome Antonin Scalia of the American Bar Association's Coordinating Group in Regulatory Reform. Professor Scalia has testified before our subcommittee on a previous occasion and I'm pleased to have his invaluable comments on the record for the 97th Congress.

Now at this time we are very honored to have before the committee the Honorable Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice.

If you would like to bring any staff person with you to the table, Mr. Olson.

STATEMENT OF THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. OLSON. No; that will not be necessary. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, thank you for affording me the opportunity to appear before you today to discuss congressional review of agency rules and, in particular, legislative vetoes.

I hasten to acknowledge that there may be little that I can add to this subcommittee's wisdom developed during the extensive hearings which you held during the 96th Congress. Furthermore, I will endeavor not to repeat the testimony which I supplied to a Senate subcommittee last April, a copy of which we have provided to you.

In my remarks today I will expand upon this administration's constitutional objections to legislative vetoes and discuss briefly the broader subject of congressional review of agency rules. Consideration of alternative methods of congressional review of agency actions, including rules, should not be deterred by concentration exclusively on the legislative veto. There are numerous techniques that may better serve the objectives of restraining and preventing agency or administrative abuses without deviating from fundamental constitutional requirements concerning the procedures by which Congress may legislate and the principle of the separation of powers.

As a preliminary matter, I would like to address two points.

First, my testimony represents the position of the administration concerning the constitutionality of legislative veto provisions. As a matter of policy, however, and as I will discuss in more detail later in my testimony, the administration is not opposed to all congressional oversight devices. Without in any way diminishing its responsibility to challenge the constitutionality of such matters in the courts, in the legislative process the administration may not necessarily oppose certain legislative oversight measures relative to selected independent agencies. The President might well decide to sign a bill containing such a proposal; indeed, every modern President has signed similar laws in the past. However, the administration would be compelled to oppose any legislative veto provision that applied to executive branch agencies under the direct supervision and control of the President.

Second, as another preliminary matter, I would like to address the notion, mistaken in my view, that legislative vetoes present liberal-conservative issues. Characterization in this manner tends to confuse the debate, divert attention from the real concerns, and utterly misconstrue the nature of the relevant legal and policy considerations.

Legislative vetos implicate two general areas of constitutional concern: No. 1, how laws are created, and No. 2, how the power to execute laws is allocated under our Constitution. It is neither accurate nor illuminating to characterize concern for the principles that laws may only be created by the affirmative votes of both Houses of Congress and the concurrence of the President or a congressional override of his veto as "liberal" or "conservative." Morever, the elaboration of constraints placed by the principle of separation of powers on the executive or legislative branches is not, and in rational terms cannot, be analyzed in terms of considerations that usually are viewed as conservative or liberal. Neither end of the political spectrum has an exclusive claim to the conviction that the executive power is vested by the Constitution in the President.

There is obviously a great deal more than partisanship involved in opposition to a technique by Presidents ranging from Roosevelt, Truman, Kennedy and Johnson to Hoover, Eisenhower, Nixon, and Ford. I do not believe that either liberal or conservative leanings prompted one of my predecessors, then-Assistant Attorney General, now Supreme Court Justice William Rehnquist, to refer to legislative vetoes as "clearly . . . a violation of the separation of powers." The same may be said of a 1977 American Enterprise Institute-sponsored study which stated that the legislative veto device "is, almost necessarily, unconstitutional."

Partisan labeling of this issue simply does not promote analysis or understanding. The issue must be approached and addressed from the dual standpoints of how a particular legislative veto might rearrange the manner in which laws are created, either without participation by the President or without both the President and some portion of the Congress, and the extent to which a particular form of legislative veto might revise the President's constitutional responsibility to enforce and administer the laws that Congress enacts.

With this background in mind, I would like to turn to an analysis of the constitutionality of legislative vetoes.

I. The Legislative Veto

Because the term "legislative veto" has been used to describe a wide variety of congressional oversight techniques, it is analytically useful to provide a definition of the term. It is a statutory provision under which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the executive branch a specific requirement to take or refrain from taking an action. A key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto. Such a provision contemplates a procedure under which one or both Houses of Congress, or a committee of one House, may act contrary to the constitutional procedure for enacting laws to overrule, reverse, revise, modify, suspend, prevent or delay an action by the President or some part of the executive branch.

The two-House legislative veto involves both Houses acting affirmatively by concurrent resolution—as in the case of motor vehicle safety standards, 15 U.S.C. section 1410b(d). A variation is the active involvement by one House of Congress and the passive acquiescence or failure to disagree by the other House, which is termed a "one-and-one-half House" legislative veto—as in S. 890, 97th Congress, 1st Session (1981), the proposed Regulatory Reduction and Congressional Control Act of 1981.

A legislative veto provision may provide for a veto by one House of Congress—as in the Federal Pay Comparability Act, 5 U.S.C. Section 5305(c)(2), or in the Congressional Budget and Impoundment Control Act, 31 U.S.C. Section 1403(b)—or by one committee of one House of Congress—as in the case of the Federal Land Policy and Management Act, 43 U.S.C. Section 1714(3).

Legislative veto provisions are contained in statutes dealing with rulemaking by executive branch departments and agencies—for instance, rulemaking by the Department of Education, 20 U.S.C., section 1232(d)—as well as with rulemaking by independent agencies and commissions—for instance, rulemaking by the Federal Trade Commission, in view of section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1.

They also are contained in legislation under which executive branch officials are called upon to execute the law in particular cases—for instance, when the Attorney General suspends the deportation of an alien under 8 U.S.C. Section 1254, when the President approves execution of an agreement with another nation for atomic energy cooperation under 42 U.S.C. Section 2143(d), or when the National Railroad Passenger Corporation seeks to alter Amtrak's basic route system under 45 U.S.C. Section 564(c).

As a recent Congressional Research study noted, as to presently pending legislation, there are 20 different variations of legislative vetoes which have been introduced just this year.

A. Constitutional Defects

For purposes of constitutional analysis, all of the types of legislative vetoes that I have outlined share two substantial infirmities.

First, because they do not provide for presentation to the President of a resolution purporting to bind the executive branch, they violate the constitutionally mandated procedures for legislative action set forth in the presentation clauses of article I, section 7, clauses 2 and 3. A related defect of legislative veto provisions other than two-House vetoes is that they violate the constitutional principle of bicameralism, under which all exercises of the legislative power having binding effect on the executive branch must first involve passage of a resolution or bill by both Houses of Congress, not just one House or one committee, before presentation to the

President. This is also a requirement of article I, section 7, clauses 2 and 3.

Second, since legislative vetoes would allow the legislative branch, or some unit of it, to substitute its judgment about how best to execute the law for that of the executive branch, legislative veto provisions violate the underlying constitutional principle of the separation of powers, under which the Legislature is to legislate and the executive is to execute the law.

I will discuss these constitutional defects in turn.

(1) ARTICLE I, SECTION 7

(a) The presentation clauses

A resolution adopted pursuant to a legislative veto provision is necessarily an exercise of Congress' Article I power to take legislative action. Article I is the source of Congress' power to impose legal requirements on the executive branch. As noted earlier, while some forms of legislative vetoes apply to purely executive actions, Congress simply may not execute the law. That power is given to the President.

Article II, section 1, clause 1 states that executive power "shall be vested in the President." With certain express exceptions—that is, the Senate's advice and consent regarding Presidential appointments—when Congress acts, it is exercising its legislative powers.

However, the Constitution did not leave it to the discretion of Congress to decide how it will exercise its legislative power. Specific procedures must be followed as prescribed in article I, section 7, clauses 2 and 3. Article I, section 7, clause 2 provides that every bill before it becomes a law shall have been passed by both Houses of Congress and shall have been presented to the President for his approval or veto. If the President disapproves of a bill and vetoes it, the bill may still become law if it is repassed by a two-thirds vote of both Houses of Congress.

The Framers anticipated and closed the loophole that might have been thought to exist under clause 2 which, standing alone, might have been perceived to have allowed Congress to avoid the presentation requirement by legislating in the form of resolutions rather than bills. They added to the text of the Constitution article I, section 7, clause 3, which provides in language that in many respects tracks clause 2 that "every order, resolution, or vote" requiring concurrent action, except resolutions of adjournment, "shall be presented to the President," who may approve or veto the order, resolution or vote.

Like clause 2, clause 3 provides that after a proposal is vetoed, it still may become law if it is subsequently passed by a two-thirds vote of both Houses of Congress. Thus, clause 3, read in conjunction with clause 2, makes quite plain that the Framers intended that all exercises of legislative power having the substantive effects of legislation, irrespective of the form of congressional action, must follow the specified legislative procedure.

Clauses 2 and 3 demonstrate that the Framers intended that all exercises of legislative power must follow the required process, which includes passage by both Houses of Congress and then presentation to the President. As one commentator noted, "it would be difficult to conceive of language and history which would more clearly require that all concurrent action of the two Houses be subject to the President's approval or veto."

Legislative veto provisions fall short of compliance with these requirements in that they do not permit the President to exercise his power to approve or veto a legislative veto resolution.

The presentation requirement is critical to our constitutional scheme of government. The separation of powers that distinguishes our Constitution is counterweighted with a system of checks by each branch over the other two.

The President's power to approve or veto actions of Congress is absolutely necessary to the preservation of the Presidency and to the system of constitutional checks and balances. See *The Federalist* Nos. 48 and 73; 2 M. Farrand, *Records of the Federal Convention of 1787,* 299-300, 586-87 (rev. ed. 1937). The Constitution's Framers feared that, absent a Presidential veto, "the legislative and executive powers might speedily come to be blended in the same hands." *The Federalist* No. 73, at 494 (J. Cooke ed., 1961).

The Framers also believed that the President's veto power could operate on behalf of the public interest to protect against the effects of special interests in our public life. See *The Federalist* No. 73. Without the veto power, as Alexander Hamilton observed, the President "would be absolutely unable to defend himself against the depredations of the legislative branch. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote."

Legislative veto provisions purport to authorize congressional resolutions that change the law without being subject to the Presidential veto. They circumvent one of the President's most important constitutional powers, in a sense, his only defense. They are therefore not constitutionally permissible.

The argument that legislative veto provisions directed at agency rules do not contemplate the exercise of legislative power does not survive a straightforward analysis. Typically, Congress delegates rulemaking authority to an agency to implement policy objectives mandated by statute. Agency regulations adopted pursuant to such an authorization have the force and effect of law if they are within the substantive delegation of the rulemaking power. See for example *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 295-96 (1979).

Such a statutory delegation, which requires the concurrence of both Houses of Congress and presentation to the President, may be withdrawn or modified only by following the same procedure for legislation. In contrast, a legislative veto provision would erect a fundamentally different scheme. It would allow Congress—whether two Houses, one House or otherwise—to overrule or block a rule or decision by the executive branch that had been issued pursuant to statutory authorization. The effect would amount to repealing or partially modifying the prior statutory authorization without following the prescribed process of presenting to the President resolutions having a public, legally binding effect. Hence, the resolutions constitute legislative actions and, to be constitutional, they must be presented to the President for his concurrence or veto.

(b) The bicameralism principle

Legislative veto provisions that contemplate action by Congress without affirmative approval by both Houses of Congress also violate the Constitution's bicameralism principle, which has been said to be the internal check on the legislative branch. This principle, like the presentation requirement, is embodied in article I, section 1, and article I, section 7, clauses 2 and 3.

The latter two clauses, which I already have discussed, require that any measure that has the effect of an exercise of legislative power, whether in the form of a bill, resolution or otherwise, must be affirmatively approved by both Houses of Congress. This conclusion is buttressed by the language of article I, section 1, which vests "all legislative powers herein granted" in "a Congress of the United States, which shall consist of a Senate and House of Representatives."

The bicameralism principle contemplates actual passage of a resolution by both Houses, not mere passive acquiescence by one of the two Houses with respect to the action of the other House. Legislative veto provisions that contravene this bicameralism principle are invalid for that reason alone.

(2) THE PRINCIPLE OF THE SEPARATION OF POWERS

The additional constitutional defect of legislative veto provisions is that, to the extent that they permit Congress to reserve to itself powers vested by the Constitution in the executive and judicial branches, they violate the principle of the separation of powers. This principle, one of the two or three most fundamental premises that underlie our Constitution, is directly reflected in the Constitution's structure, which establishes the three branches of government in articles I, II, III, for the purposes of legislating, executing the laws and adjudicating, respectively. It also is reflected in several other provisions, including article I, section 7, clauses 2 and 3, the presentation clauses; article I, section 6, clause 2, the ineligibility and incompatibility clause; and article II, section 2, clause 2, the appointments clause. See generally *Buckley* v. *Valeo,* 424 U.S. 1,120–37 (1976).

The principle of the separation of powers is based on the premise that if one branch of government could, on its own initiative, merge legislative, executive, or judicial powers, it could easily become dominant and tyrannical. In such a circumstance, it would not be subject to the checks on governmental power that the Framers considered a necessary protection of freedom. See The Federalist, Nos. 47 and 73.

The three branches of government are not watertight compartments acting in isolation of each other. *Springer* v. *Government of the Philippine Islands,* 277 U.S. 189, 211 (1928) (Holmes, J., dissenting); see *Youngstown Sheet and Tube Company* v. *Sawyer,* 343 U.S. 579, 635 (1952) Jackson, J., concurring. Rather, the Framers conceived of national government as involving the dynamic interaction between the three branches, with each checking the others and balancing the powers conferred on the others with its own assertions of power. At the core of this concept is the precept that no single branch can usurp or arrogate to itself the essential functions of the other branches.

The Framers realized that "in republican government, the legislative authority necessarily predominates," The Federalist, No. 51, at 350 (J. Cooke ed., 1961). One of their major concerns was to insure that this most powerful branch of government did not become too powerful. As stated in another of the Federalist Papers, "it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions." (The Federalist, No. 48, at 334 (J. Cooke, ed., 1961).)

The Framers knew, as Blackstone had observed, that "in all tyrannical governments the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men." (1 W. Blackstone, Commentaries, 146 (Cooley ed., 1876)).

Madison observed that the accumulation of legislative, executive, and judicial power in one department was "the very definition of tyranny." (The Federalist, No. 47, at 324 (J. Cooke ed., 1961).) He cited Montesquieu for the proposition that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." (Id. at 325.) Precisely in order to prevent such an accumulation of power, the Constitution was structured so that, according to Madison again, "The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law and the entire legislature can exercise no executive prerogative." (Id. at 326.)

The boundary between legislative and executive action is set in the first instance by Congress when it decides how much discretion to delegate to the executive branch in implementing policies established by this body by statute. Once such an authorization is enacted, however, the implementation of the statutory policies is an executive function. Indeed, it is the core of the executive branch's function. The statute sets a boundary beyond which the executive branch may not go without intruding on the legislative function. It similarly sets a boundary within which the executive must be allowed to function without congressional vetoes or requirements except as adopted through the constitutional process of legislation. If it were otherwise, Congress would be able to arrogate to itself the essence of the executive's function. In that circumstance, there would be no place for the executive as a separate, coequal branch of government.

This principle is violated by legislative veto provisions to the extent that they would give to the Houses of Congress, or even committees of Congress, the power to intervene, apart from the passage of legislation, directly in the process by which the executive branch executes the law in particular cases or by rulemaking. They would effectively transform executive decisions into tentative actions, rather like those of congressional committees, having no force and effect of their own but merely achieving legal status if Congress, for example, approves them.

In essence, a legislative veto of agency rules would set up the Houses of Congress as final administrative authorities over the whole range of regulatory matters. Legislative vetoes of purely executive decisions take the power from the executive branch and vest it in the Congress just as surely as if the President were simply an advisory official, suggesting proposed actions to Congress. This system might be what some would prefer, but it is not the system that our Constitution created.

It must be conceded that there have been abuses of power by executive branch agencies. Congress is properly disturbed when an agency exceeds the limits on its discretion or ignores the manifest will of the legislature. But in our system, the judiciary, not Congress, corrects such abuses absent the adoption of plenary legislation by Congress.

As members of this subcommittee repeatedly have observed, it is your right and your responsibility to set policies and to insist that the policies you establish will be implemented. However, as Justice Brandeis noted, the doctrine of the separation of powers was adopted "not to promote efficiency but to preclude the exercise of arbitrary power; not to avoid friction, but to save the people from autocracy." *Myers* v. *United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

B. Responses to Proponents of Legislative Vetoes

I would like briefly to respond to the major rejoinders by those who support legislative veto provisions and believe that they are not unconstitutional.

First, although some argue otherwise, there is no meaningful constitutional distinction to be drawn between legislative vetoes of rulemaking and of other types of agency action. Rulemaking is a form of executive action. See *Buckley* v. *Valeo,* supra, 424 U.S. at 140–41. Like other such actions, it is lodged in the executive branch under article II of the Constitution.

The distinction between rulemaking and other forms of executive action carries no weight with respect to compliance with the constitutionally prescribed procedure for the exercise of legislative power. Article I, section 7, clauses 2 and 3 specify the process to be followed by all legislative action having the force of law and not otherwise covered by constitutional sections specifically providing for a different procedure, regardless whether the action affects rulemaking, adjudication or other decisions by agencies.

Second, it has been argued that the adoption of a resolution disapproving an agency rule pursuant to a legislative veto provision is not really an exercise of legislative power and is not therefore subject to the constitutional provisions that I have described but, rather, is the exercise of a condition on agency discretion under a statute giving the agency rulemaking power in the first place. Viewed in that light, original grants of rulemaking discretion to agencies in organic statutes would be changed by amendments containing legislative veto provisions to conditional delegations of power.

The analogy here is to grants of statutory power made contingent upon findings of fact by an executive branch officer, or upon the favorable vote of persons who will be affected by proposed governmental action. (See H.R. Rep. No. 120, 76th Congress, 1st Session, 6 (1939).)

Such an argument is, in the first instance, semantic in that it presupposes that affixing another label to the final act of the legislative body which determines what the law will or will not be can render it not an exercise of legislative power. That supposition simply exalts the label over the reality of what is occurring. Moreover, the fatal analytical deficiency in this argument is that it assumes that the delegation of power to a person or entity outside the legislative branch is constitutionally equivalent to the delegation of power to the Houses of Congress, which are within the legislative branch and thus subject to the strictures of article I. That assumption is insupportable.

The Framers of our Constitution did not want Congress to have the power that they gave to the Executive. Whenever power is vested outside Congress, it is not concentrated within it. The undue concentration of power in Congress is what the separation of powers is specifically designed to avoid. Hence, a provision allowing persons or bodies outside Congress to determine whether conditions on the exercise of delegated authority have been met does not present the same constitutional separation of powers questions that vesting such power within Congress raises.

The other deficiency, of course, in the conditional delegation argument is that, if carried to its obviously logical and natural extreme, it would allow a single Member of Congress to be authorized to veto any or every executive action, an obvious absurdity.

Third, it is no response to the constitutional objections to legislative vetoes to assert that they are authorized by the necessary and proper clause, article I, section 8, clause 18, which grants Congress power to "make all laws which shall be necessary and proper for carrying into execution the foregoing—enumerated—powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." The exercise of article I power by Congress pursuant to the necessary and proper clause is limited by other express provisions of the Constitution, including article I, section 7, clauses 2 and 3, and by the principle of the separation of powers. See *Buckley* v. *Valeo,* supra, 424 U.S. at 135.

As the U.S. Court of Appeals for the Ninth Circuit noted in *Chadha* v. *Immigration and Naturalization Service*. 634 Fed. 2d 408, 433 (1980), appeal filed No. 80-1832 (U.S. Sup. Ct., May 1981), the case now before the U.S. Supreme Court, the necessary and proper clause authorizes Congress to "make all laws," not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power.

C. Policy Objections

In addition to their serious constitutional defects, legislative vetoes, as I think you noted this morning, Mr. Chairman, are objectable for a variety of additional reasons. First, they do nothing to cure the root causes of regulatory excesses, duplication or inefficiency, namely broad, relatively standardless delegations of power to agencies. In fact, legislative vetoes have a natural tendency to encourage broader statutory delegations, for they provide the superficial reassurance that Congress may have a role in implementing a statute after it is passed and thus need not carefully define an agency's powers and limits before the law is enacted. The result of overbroad delegation is excessive agency discretion that could not possibly be monitored carefully by Congress.

Legislative vetoes also have been said measurably to increase the amount of behind-the-scenes negotiation between agencies and committee staffs and single Members of Congress to the detriment of a public, fully accountable administrative process. In addition, many legislative veto provisions foster delay, for even though only a few rules or actions would likely be vetoed, all matters referred to Congress would be subject to deferral and uncertainty.

To the extent that legislative vetoes may be passed by less than two Houses of Congress, they undermine the accountability of all Members of Congress for the actions of this body. They thus encourage the tendency of decentralization of power within Congress to the detriment of the body as a whole.

Furthermore, to the extent that Congress as a body does get seriously involved in reviewing rules or other Executive actions subject to legislative vetoes, Congress predictably will get hopelessly mired in details. As Thomas Jefferson wrote:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, 'til the occasions have passed them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no Federal head, by diverting the attention of that head from great to small subjects. . .

In short, legislative vetoes do not solve the problems of administrative excess that they are intended to correct and they have several policy infirmities of their own.

II. CONGRESSIONAL REVIEW OF AGENCY ACTION IN GENERAL

Although the administration believes that legislative veto provisions are unconstitutional and is taking that position in pending litigation, we would stress that there are many fully constitutional legislative oversight mechanisms that Congress can use to achieve the goals of more effective review of Executive action, including rules. In organic statutes Congress can, and undoubtedly should, place specific and precise limits on the authority of agencies to issue rules. Moreover, Congress always can override unwise, inappropriate, burdensome or excessive agency rules with legislation. To the extent that the procedural hurdles within Congress which impede the enactment of legislation have fostered legislative veto proposals, Congress can adopt legislation assuring early floor consideration of bills overturning agency rules.

Congress also can authorize an agency to act for a limited period of time, thereby forcing the agency to return to Congress for authority to continue to act when its authorization expires. Congress can hold oversight hearings at which explanations for agency rules that Members of Congress may question can be sought and made part of a public record. Congress can adopt resolutions expressing its views that, while not legally binding upon the executive branch unless adopted pursuant to the plenary legislative process, can guide an agency in its implementation of the law.

Further, Congress has authority to appropriate the money with which agencies execute the law. In appropriations statutes, Congress can provide for limitations on the expenditure of funds for certain purposes consistent with any other applicable legal requirements.

Another alternative is one that I understand originated in this subcommittee last year. It is the proposal to create a Select Committee on Regulatory Affairs that would be given broad jurisdiction over the rulemaking activities of the Federal Government. By virtue of its broad jurisdiction, such a committee could investigate issues of regulatory overlap and duplication that presently prove difficult for standing committees to address.

The common themes underlying these several alternative methods by which Congress actively can review agency rules is that they do not displace the President and the executive branch in the execution of the law. They respect the principle of the separation of powers, as well as the presentation and bicameralism principles that apply to exercises of legislative power.

There should be no doubt regarding this administration's concern about excessive and abusive agency actions. Indeed, this administration has already taken numerous steps to assure that agency rules are carefully considered and limited in the manner provided by Congress. If further oversight is necessary, we would support the use of joint resolutions providing for consideration by both Houses of Congress, presentation to the President and a congressional override of any Presidential veto in the rare case in which it might occur. Such a method would include in the process all of the major elected officials in the National Government.

As you know, the President shares your concern that the costs and burdens of Government must be diminished. Any mutual attempts to achieve this objective that do not strip the President of his constitutional power would be welcomed.

In conclusion, we respect the views of those Members of Congress who disagree with us on the constitutional questions and we join in their desire for a reasonably prompt resolution of this dispute in the courts. In the meantime, we urge restraint against proposals that tend to rearrange the powers which our forefathers so carefully distributed among the three branches.

The debate over legislative vetoes and alternative ways for Congress to oversee agency rules must be viewed in terms of the most basic structural underpinnings of our system of government—checks by the legislature upon itself, the principle of bicameralism; checks by the President on the Congress in the form of presentment of legislation to him for veto or approval; and the separation of powers between Congress and the executive branch. The temptation to vest greater power in Congress and to exercise greater control over the executive branch should not provide the excuse for a major structural rearrangement in violation of these prinicples.

Each branch, and our forefathers predicted this, seems inclined to rectify perceived abuses in the other two by expediencies that the Constitution will not tolerate. We must be ever mindful that the genius that created this precious system which has preserved our freedom for nearly 200 years expressly eschewed remedies for temporary problems that pave a path for excessive domination by one branch of Government.

Thank you, Mr. Chairman.

[Mr. Olson's prepared statement, with attachments, follow:]

Department of Justice

STATEMENT

OF

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

SUBCOMMITTEE ON RULES OF THE HOUSE
COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE LEGISLATIVE VETO AND CONGRESSIONAL
REVIEW OF AGENCY RULES

ON

OCTOBER 7, 1981

Mr. Chairman and Members of the Subcommittee on Rules of the House:

Introduction

Thank you for affording me the opportunity to appear before you today to discuss Congressional review of agency rules and, in particular, legislative vetoes.

I hasten to acknowledge that there may be little that I can add to this Subcommittee's wisdom in this field. This Subcommittee performed a valuable service during the 96th Congress by holding extensive hearings on this topic. I may not be able to expand upon the wealth of material contained in the several volumes published on this subject by this Subcommittee last Congress.

I should note at the outset that I supplied testimony in this area last April to the Subcommittee on Agency Administration of the Committee on the Judiciary of the United States Senate. Rather than take your time with a repetition of the views expressed on that occasion, I am furnishing your Subcommittee with a copy of that testimony and ask that it be included as part of the record of today's hearing.

In my remarks today, I will expand upon this Administration's constitutional objections to legislative vetoes and discuss briefly the broader subject of Congressional review of agency rules. Consideration of alternative methods of Congressional review of agency actions, including rules, should not be deterred by concentration exclusively on the legislative veto. There are numerous techniques that may better servc the objectives of restraining and preventing agency or administrative abuses without deviating from fundamental constitutional requirements concerning the procedures by which Congress may legislate and the principle of the separation of powers.

As a preliminary matter, I would like to address two points. First, my testimony represents the position of the Administration concerning the constitutionality of legislative veto provisions. As a matter of policy, however, and as I will discuss in more detail later in my testimony, the Administration is not opposed to all congressional oversight devices. Without in any way diminishing its responsibility to challenge the constitutionality of such matters in the courts, in the legislative process the Administration may not necessarily oppose certain legislative oversight measures relative to selected "independent" agencies. The President might well decide to sign a bill containing such a proposal; indeed, every modern President has signed similar laws in the past. However, the Administration would be compelled to opposed any legislative veto provision that applied to Executive Branch agencies under the direct supervision and control of the President.

Second, I would like to address the notion, mistaken in my view, that legislative vetoes present "liberal"-"conservative" issues. Characterization in this manner tends to confuse the debate, divert attention from the real concerns and utterly misconstrue the nature of the relevant legal and policy considerations.

Legislative vetoes implicate two general areas of constitutional concern: (1) how laws are created and (2) how the power to execute laws is allocated under our Constitution. It is neither accurate nor illuminating to characterize concern for the principles that laws may only be created by the affirmative votes of both Houses of Congress and the concurrence of the President or a Congressional override of his veto as "liberal" or "conservative." Moreover, the elaboration of constraints placed by the principle of separation of powers on the Executive or Legislative Branches is not, and in rational terms cannot, be analyzed in terms of considerations that usually are viewed as "conservative" or "liberal." Neither end of the political spectrum has an exclusive claim to the conviction that the executive power is vested by the Constitution in the President.

There is obviously a great deal more than partisanship involved in opposition to a technique by Presidents ranging from Roosevelt, Truman, Kennedy and Johnson to Hoover, Eisenhower, Nixon and Ford. I do not believe that either "liberal" or "conservative" leanings prompted one of my predecessors, then-Assistant Attorney General, now Supreme Court Justice William Rehnquist, to refer to legislative vetoes as "clearly . . . a violation of the separation of powers." 1/ The same may be said of a 1977 American Enterprise Institute-sponsored study which stated that the legislative veto device "is, almost necessarily, unconstitutional." 2/

1/ Rehnquist, Committee Veto: Fifty Years of Sparring Between the Executive and Legislature 9-10 (Speech before the Section on Administrative Law of the American Bar Association, Aug. 12, 1969).

2/ J. Bolton, The Legislative Veto: Unseparating the Powers 49 (Am. Ent. Inst. 1977).

Partisan labeling of this issue simply does not promote analysis or understanding. The issue must be approached and addressed from the dual standpoints of how a particular legislative veto might rearrange the manner in which laws are created -- either without participation by the President or without both the President and some portion of the Congress -- and the extent to which a particular form of legislative veto might revise the President's constitutional responsibility to enforce and administer the laws that Congress enacts.

With this background in mind, I would like to turn to an analysis of the constitutionality of legislative vetoes.

I. The Legislative Veto

Because the term "legislative veto" has been used to describe a wide range of Congressional oversight techniques, it is analytically useful to provide a definition of the term. It is a statutory provision under which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch a specific requirement to take or refrain from taking an action. A key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto. Such a provision contemplates a procedure under which one or both Houses of Congress or a committee of one House may act contrary to the constitutional procedure for enacting laws to overrule, reverse, revise, modify, suspend, prevent or delay an action by the President or some other part of the Executive Branch.

The two-House legislative veto consists of both Houses acting affirmatively by concurrent resolution (as in the case of motor vehicle safety standards, 15 U.S.C. § 1410b(d)). A variation is the active involvement by one House of Congress and the passive acquiescence or failure to disagree by the other House -- which is termed a "one-and-one-half House" legislative veto (as in S. 890, 97th Cong., 1st Sess. (1981), the proposed Regulatory Reduction and Congressional Control Act of 1981). A legislative veto provision may provide for a veto by one House of Congress (as in the Federal Pay Comparability Act, 5 U.S.C. § 5305(c)(2), or in the Congressional Budget and Impoundment Control Act, 31 U.S.C. § 1403(b)), or by one committee of one House of Congress (as in the case of the Federal Land Policy and Management Act, 43 U.S.C. § 1714(e)). Legislative veto provisions are contained in statutes dealing with rulemaking by Executive Branch departments and agencies (for instance, rulemaking by the Department of Education, 20 U.S.C. § 1232(d)), as well as with rulemaking by "independent" agencies and commissions (for instance, rulemaking by the Federal Trade Commission, in view of § 21 of the Federal Trade Commission Improvement Act of 1980, 15 U.S.C. § 57a-1). They also are contained in legislation under which Executive Branch officials are called upon to execute the law in particular cases -- for instance, when the Attorney General suspends the deportation of an alien, 8 U.S.C. § 1254, when the President approves execution of an agreement with another nation for atomic energy cooperation, 42 U.S.C. § 2153(d), or when the National Railroad Passenger Corporation seeks to alter Amtrak's basic route system, 45 U.S.C. § 564(c).

A. Constitutional Defects

For purposes of constitutional analysis, all of the types of legislative vetoes that I have outlined share two substantial infirmities. First, because they do not provide for presentation to the President of a resolution purporting to bind the Executive Branch, they violate the constitutionally mandated procedures for legislative action set forth in the Presentation Clauses of Article I, Section 7, Clauses 2 and 3. A related defect of legislative veto provisions other than two-House vetoes is that they violate the constitutional principle of bicameralism, under which all exercises of the legislative power having binding effect on the Executive Branch must first involve passage of a resolution or bill by both Houses of Congress -- not just one House or one committee -- before presentation to the President. This is also a requirement of Article I, Section 7, Clauses 2 and 3.

Second, since legislative vetoes would allow the Legislative Branch (or some unit of it) to substitute its judgment about how best to execute the law for the discretion of the Executive Branch, legislative veto provisions violate the underlying constitutional principle of the separation of powers, under which the Legislature is to legislate and the Executive is to execute the law.

I will discuss these constitutional defects in turn.

(1) Article I, Section 7

(a) The Presentation Clauses

A resolution adopted pursuant to a legislative veto provision is necessarily an exercise of Congress' Article I power to take legislative action. Article I is the source of Congress' power to impose legal requirements on the Executive Branch. As noted earlier, while some forms of legislative vetoes apply to purely executive actions, Congress simply may not execute the law. That power is given to the President. Article II, Section 1, Clause 1 states that executive power "shall be vested in [the] President." With certain express exceptions (*e.g.*, the Senate's advice and consent regarding Presidential appointments), when Congress acts, it is exercising its legislative powers.

However, the Constitution did not leave it to the discretion of Congress to decide *how* it will exercise its legislative power. Specific procedures must be followed as prescribed in Article I, Section 7, Clauses 2 and 3. Article I, Section 7, Clause 2 provides that every "bill" "before it become[s] a Law" shall have been passed by both Houses of Congress and shall have been presented to the President for his approval or veto. If the President disapproves of a "bill" and vetoes it, the bill may still become law if it is re-passed by a two-thirds vote of both Houses of Congress.

The Framers anticipated and closed the "loophole" that might have been thought to exist under Clause 2 which might, standing alone, have been perceived to have allowed Congress to avoid the presentation requirement by legislating in the form of resolutions rather than "bills." They added to the text of the Constitution Article I, Section 7, Clause 3, which provides in language that in many respects tracks Clause 2 that "[e]very Order, Resolution, or Vote" requiring concurrent action (except resolutions of adjournment) 3/ "shall be presented to the President," who may approve or veto the order, resolution or vote. Like Clause 2, Clause 3 provides that after a proposal is vetoed, it may still become law if it is subsequently passed by a two-thirds vote of both Houses of Congress. Thus, Clause 3, read in conjunction with Clause 2, makes quite plain that the Framers intended that all exercises of legislative power having the substantive

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3/ Article I, Section 5, Clause 4 prevents adjournment for more than three days without the consent of each House. Because such adjournments thus must be accomplished by concurrent action, a specific proviso in Article I, Section 7, Clause 3 was necessary to prevent Congress from having to submit adjournment resolutions to the President. It would be inappropriate for Congress to have to present adjournment resolutions to the President for his approval or veto since the President is able to convene Congress in any event. *See* Article II, Section 3; S. Rep. No. 1335, 54th Cong., 2d Sess. 6 (1897).

effects of legislation, irrespective of the form of Congressional action, must follow the specified legislative procedure. 4/

Clauses 2 and 3 demonstrate that the Framers intended that all exercises of legislative power must follow the required process, which includes passage by both Houses of Congress and then presentation to the President. 5/ As one commentator noted, "[i]t would be difficult to conceive of language and history which would more clearly require

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4/ The history of the adoption of Clauses 2 and 3 confirms that conclusion. During the debate on the Presidential veto provision, James Madison observed that

> if the negative of the President was confined to bills, it would be evaded by acts under the form and name of resolutions, votes [etc. He] proposed that "or resolve" should be added after "bill," . . ., with an exception as to votes of adjournment [etc.]. (emphasis in original)

5 J. Elliot, Debates on the Adoption of the Federal Constitution 431 (1845). Although Madison's proposal was initially rejected, it was renewed during the following day's session by Mr. Randolph, who put the proposal in a new form substantially as it now appears. It was then adopted by a 9 to 1 vote. 2 M. Farrand, Records of the Federal Convention of 1787, 201-05 (rev. ed. 1937).

5/ Exercises of legislative power having the substantive effect of legislation and subject to the procedures of Article I, Section 7 are distinguishable from: (1) acts that may be taken by one or both Houses of Congress or their committees because they are merely in aid of Congress' legislative power and do not purport to bind the Executive Branch, such as investigations, oversight hearings, or requests for information from the Executive Branch; and (2) acts by one or both Houses of Congress expressly authorized by a constitutional provision that does not require the procedures in Article I, Section 7. (cont'd next page) that all concurrent action of the two Houses be subject to the President's approval or veto." 6/ Legislative veto provisions fall short of compliance with these requirements in that they do not permit the President to exercise his power to approve or veto a legislative veto resolution.

The presentation requirement is critical to our constitutional scheme of government. The separation of powers that distinguishes our Constitution is counter-weighted with a system of checks by each Branch over the other two. The President's power to approve or veto actions of Congress is absolutely necessary to the preservation of the Presidency and to the system of checks and balances. See The Federalist Nos. 48 & 73; 2 M. Farrand, Records of the Federal

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5/(cont'd)
The latter class of actions includes the power of the House of Representatives to impeach (Article I, Section 2, Clause 5); the Senate's power to try all impeachments (Article I, Section 3, Clause 6) and to ratify treaties and pass upon Presidential nominations (Article II, Section 2, Clause 2); the power of both Houses to pass a concurrent resolution of adjournment that is not presented to the President (Article I, Section 7, Clause 3); and the power of each House to establish rules governing its own proceedings (Article I, Section 5, Clause 2). See also Article V and Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (power of both Houses by a two-thirds vote to propose constitutional amendments). In addition, of course, one or both Houses of Congress can employ a resolution as a means of expressing an opinion of the House that purports to have no binding effects on the Executive Branch.

6/ Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 573 (1953).

Convention of 1787, 299-300, 586-87 (rev. ed. 1937). The Constitution's Framers feared that, absent a Presidential veto, "the legislative and executive powers might speedily come to be blended in the same hands." The Federalist No. 73, at 494 (J. Cooke ed., 1961). The Framers also believed that the President's veto power could operate on behalf of the public interest to protect against the effects of special interests in our public life. See The Federalist No. 73. Without the veto power, as Alexander Hamilton observed, the President "would be absolutely unable to defend himself against the depredations of the [Legislative Branch]. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote." 7/

Legislative veto provisions purport to authorize Congressional resolutions that change the law without being subject to the Presidential veto. They circumvent one of the President's most important constitutional powers -- in a sense, his only defense. They are therefore not constitutionally permissible.

The argument that legislative veto provisions directed at agency rules do not contemplate the exercise of legislative power does not survive a straightforward analysis. Typically, Congress delegates rulemaking authority to an agency to

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7/ The Federalist No. 73, at 494 (J. Cooke ed., 1961).

implement policy objectives mandated by statute. Agency regulations adopted pursuant to such an authorization have the force and effect of law if they are within the substantive delegation of the rulemaking power. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979). Such a statutory delegation, which requires the concurrence of both Houses of Congress and presentation to the President, may be withdrawn or modified only by following the same procedure for legislation. In contrast, a legislative veto provision would erect a fundamentally different scheme. It would allow Congress -- whether two Houses, one House or otherwise -- to overrule or block a rule or decision by the Executive Branch that had been issued pursuant to statutory authorization. The effect would amount to repealing or partially modifying the prior statutory authorization without following the prescribed process of presenting to the President resolutions having a public, legally binding effect. 8/ Hence, the resolutions constitute legislative actions and, to be constitutional, they must be presented to the President for his concurrence or veto.

8/ Because under most forms of legislative veto devices, such rules go into effect (subject to judicial review) without any further action by Congress, it cannot plausibly be argued that such rules constitute mere "proposals" or "recommendations" the veto of which does not affect the legal "status quo."

(b) The Bicameralism Principle

Legislative vetoes that contemplate action by Congress without affirmative approval by both Houses of Congress also violate the Constitution's bicameralism principle. This principle, like the presentation requirement, is embodied in Article I, Section 7, Clauses 2 and 3. These two clauses, which I have already discussed, require that any measure that has the effect of an exercise of legislative power, whether in the form of a bill, resolution or otherwise, must be affirmatively approved by both Houses of Congress. 9/ This conclusion is buttressed by the language of Article I, Section 1, which vests "[a]ll legislative Powers herein granted" in "a Congress of the United States, which shall consist of a Senate and House of Representatives" (emphasis added).

The bicameralism principle of Article I, Section 7 contemplates actual passage of a resolution by both Houses--not

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9/ See S. Rep. No. 1335, 54th Cong., 2d Sess. 1-2, 6-8 (1897). Any suggestion that by assigning "veto" power to one House, rather than both, Congress may avoid the strictures of Article I, Section 7, Clause 3 would appear to be a constitutional absurdity. See Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1066 n. 428 (it "verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt"). As another commentator put it: "It surely must be true that a power not permitted to both houses of Congress by the Constitution cannot suddenly be made available by delegating it to one house." J. Bolton, The Legislative Veto: Unseparating the Powers 39 (Am. Ent. Inst. 1977).

mere passive "acquiescence" by one of the two Houses with respect to the action of the other House. Legislative veto provisions that contravene this bicameralism principle are invalid for that reason alone.

(2) The Principle of the Separation of Powers

The additional constitutional defect of legislative veto provisions is that, to the extent that they permit Congress to reserve to itself powers vested by the Constitution in the Executive and Judicial Branches, they violate the principle of the separation of powers. This principle, one of the two or three most fundamental premises that underlie our Constitution, is directly reflected in the Constitution's structure, which establishes the three Branches of Government in Articles I, II, III, for the purposes of legislating, executing the laws and adjudicating, respectively. It also is reflected in several other provisions, including Article I, Section 7, Clauses 2 and 3 (the Presentation Clauses); Article I, Section 6, Clause 2 (the Ineligibility and Incompatability Clause); and Article II, Section 2, Clause 2 (the Appointments Clause). *See generally* *Buckley* v. *Valeo*, 424 U.S. 1, 120-37 (1976).

The principle of the separation of powers is based on the premise that if one Branch of Government could, on its own initiative, merge legislative, executive or judicial powers, it could easily become dominant and tyrannical. In such a circumstance, it would not be subject to the checks on governmental power that the Framers considered a necessary protection of freedom. See The Federalist Nos. 47 & 73. The three Branches of Government are not "watertight compartments" acting in isolation of each other. Springer v. Government of the Philippine Islands, 277 U.S. 189, 211 (1928)(Holmes, J., dissenting); see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Rather, the Framers conceived of national government as involving the dynamic interaction between the three Branches, with each "checking" the others and "balancing" the powers conferred on the others with its own assertions of power. At the core of this concept is the precept that no single Branch can usurp or arrogate to itself the essential functions of the other Branches.

The Framers realized that "[i]n republican government, the legislative authority, necessarily, predominates." The Federalist No. 51, at 350 (J. Cooke ed., 1961). One of their major concerns was to ensure that this most powerful Branch of Government did not become too powerful. "[I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No 48, at 334 (J. Cooke ed., 1961). The Framers knew, as Blackstone had observed, that "[i]n all tyrannical governments, the supreme magistracy, or the right both of *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men." 1 W. Blackstone, *Commentaries* 146 (Cooley ed., 1876) (emphasis in original). Madison observed that the accumulation of legislative, executive and judicial power in one department was "the very definition of tyranny." *The Federalist* No. 47, at 324 (J. Cooke ed., 1961). He cited Montesquieu for the proposition that "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'" *Id*. at 325. Precisely in order to prevent such an accumulation of power, the Constitution was structured so that "[t]he magistrate in whom the *whole* executive power resides cannot of himself make a law, though he can put a negative on *every* law" and "[t]he entire legislature . . . can exercise *no* executive prerogative ...." *Id*. at 326 (emphasis added).

The boundary between legislative and executive action is set in the first instance by Congress when it decides how much discretion to delegate to the Executive Branch in implementing policies established by statute. Once such an authorization is enacted, however, the implementation of the statutory policies is an executive function. Indeed, it is the *core* of the Executive Branch's function. The statute sets a boundary beyond which the Executive Branch may not go without intruding on the legislative function. It similarly sets a boundary within which the Executive must be allowed to function without Congressional vetoes or requirements except as adopted through the constitutional process of legislation. If it were otherwise, Congress would be able to arrogate to itself the essence of the Executive's function. In that circumstance, there would be no place for the Executive as a separate, co-equal Branch of Government.

This principle is violated by legislative veto provisions to the extent that they would give to the Houses of Congress or even committees of Congress the power to intervene, apart from the passage of legislation, directly in the process by which the Executive Branch executes the law in particular cases or by rulemaking. They would effectively transform executive decisions into tentative actions, rather like those of Congressional committees, having no force and effect of their own but merely achieving legal status if Congress, for example, does not disapprove them. In essence, a legislative veto of agency rules would set up the Houses of Congress as final administrative authorities over the whole range of regulatory matters. Legislative vetoes of purely executive decisions take the power from the Executive Branch and vest it in the Congress just as surely as if the President were simply an advisory official, suggesting proposed actions to Congress. This system might be what some may prefer, but it is not the system that our Constitution created.

It must be conceded that there have been abuses of power by Executive Branch agencies. Congress is properly disturbed when an agency exceeds the limits on its discretion or ignores the manifest will of the Legislature. But in our system, the Judiciary, not Congress, corrects such abuses absent the adoption of plenary legislation. As members of this Subcommittee repeatedly have observed, it is your right and your responsibility to set policies and to insist that the policies you establish will be implemented. However, as Justice Brandeis noted, the doctrine of the separation of powers was adopted " . . . . not to promote efficiency but to preclude the exercise of arbitary power . . . not to avoid friction, but . . . to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926)(Brandeis, J., dissenting).

B. Responses to Proponents of Legislative Vetoes

I would like to respond briefly to the major rejoinders by those who support legislative veto provisions and believe that they are not unconstitutional.

First, although some argue otherwise, there is no meaningful constitutional distinction to be drawn between legislative vetoes of rulemaking and of other types of agency action. Rulemaking is a form of executive action. See Buckley v. Valeo, supra, 424 U.S. at 140-41. Like other such actions, it is lodged in the Executive Branch under Article II of the Constitution. The distinction between rulemaking and other forms of executive action carries no weight with respect to compliance with the constitutionally prescribed procedure for the exercise of legislative power. Article I, Section 7, Clauses 2 and 3 specify the process to be followed by all legislative action having the force of law and not otherwise covered by constitutional sections specifically providing for a different procedure, regardless whether the action affects rulemaking, adjudication or other decisions by agencies.

Second, it has been argued that the adoption of a resolution disapproving an agency rule pursuant to a legislative veto provision is not really an exercise of legislative power and is not therefore subject to the constitutional provisions that I have described, but rather is the exercise of a condition on agency discretion under a statute giving the agency rulemaking power in the first place. Viewed in that light, original grants of rulemaking discretion to agencies in organic statutes would be changed by amendments containing legislative veto provisions to "conditional delegations." The analogy is to grants of statutory power made contingent upon findings of fact by an Executive Branch officer, or upon the favorable vote of persons who will be affected by proposed governmental action. See H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939). Such an argument is, in the first instance, semantic in that it presupposes that affixing another label to the final act of the legislative body which determines what the law will or will not be can render it not an exercise of legislative power. That supposition simply exalts the label over the reality of what is occurring. Moreover, the fatal analytical deficiency in this argument is that it assumes that the delegation of power to a person or entity outside the Legislative Branch is constitutionally equivalent to the delegation of power to the Houses of Congress, which are within the Legislative Branch and thus subject to the strictures of Article I. That assumption is insupportable. The Framers of our Constitution did not want Congress to have the power that they gave to the Executive. Whenever power is vested outside Congress, it is not concentrated within it. The undue concentration of power _in_ Congress is what the separation of powers is specifically designed to avoid. Hence, a provision allowing persons or bodies outside Congress to determine whether conditions on the exercise of delegated authority have been met does not present the same constitutional separation of power questions that vesting such power within Congress raises.

The other deficiency in the "conditional delegation" argument is that if carried to its obvious and natural extreme, it would allow a single member of Congress to be authorized to veto any or every executive action -- an obvious absurdity.

Third, it is no response to the constitutional objections to legislative vetoes to assert that they are authorized by the Necessary and Proper Clause, Article I, Section 8, Clause 18, which grants Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." The exercise of Article I power by Congress pursuant to the Necessary and Proper Clause is limited by other express provisions of the Constitution, including Article I, Section 7, Clauses 2 and 3 and by the principle of the separation of powers. See Buckley v. Valeo, supra, 424 U.S. at 135. As the United States Court of Appeals for the Ninth Circuit noted in Chadha v. Immigration and Naturalization Service, 634 F. 2d 408, 433 (1980), appeal filed No. 80-1832(U.S. Sup. Ct., May 1981), the Necessary and Proper Clause "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power."

C. Policy Objections

In addition to their serious constitutional defects, legislative vetoes are objectionable for a variety of other reasons. First, they do nothing to cure the root causes of regulatory excesses, duplication or inefficiency, namely, broad, relatively standardless delegations to agencies. In fact, they have a natural tendency to encourage broader statutory delegations, for they provide the superficial reassurance that Congress may have a role in implementing a statute after it is passed and thus need not carefully define an agency's powers and limits before the law is enacted. The result of overbroad delegation is excessive agency discretion that could not possibly be monitored carefully by Congress.

Legislative vetoes also have been said measurably to increase the amount of behind-the-scenes negotiation between agencies and committee staffs and single members of Congress to the detriment of a public, fully accountable administrative process. 10/ In addition, many veto provisions foster delay, for even though only few rules or actions would likely be vetoed, all matters referred to Congress would be subject to deferral and uncertainty.

To the extent that legislative vetoes may be passed by less than two Houses of Congress, they undermine the accountability of all members of Congress for actions of Congress. They thus encourage the tendency of decentralization of power within Congress to the deteriment of the body as a whole. Furthermore, to the extent that Congress as a body does get seriously involved in reviewing rules or other executive actions subject to legislative vetoes, Congress predictably will get hopelessly mired in details. As Jefferson wrote:

> Nothing is so embarrassing nor so mischievous,

10/ *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1409-14 (1977).

> in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects 11/

In short, legislative vetoes do not solve the problems of administrative excess that they are intended to correct and they have several policy infirmities of their own.

II. Congressional Review of Agency Action in General

Although the Administration believes that legislative veto provisions are unconstitutional and is taking that position in pending litigation, 12/ we would stress that there are

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11/ 6 T. Jefferson, *The Writings of Thomas Jefferson* 228 (A. Bergh ed. 1903)(letter to E. Carrington, Aug. 4, 1787).

12/ Among the pending cases are *Immigration and Naturalization Service* v. *Chadha*, No. 80-1832 (U.S. Sup. Ct., May 1981), in which the Department of Justice has filed a Jurisdictional Statement in the Supreme Court on behalf of the Immigration and Naturalization Service; *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, Nos. 80-2184, 80-2312, argued on September 10, 1981, before a panel of the United States Court of Appeals for the District of Columbia Circuit; and *Pacific Legal Foundation* v. *Watt*, No. 81-141, and *Mountain States Legal Foundation* v. *Watt*, No. 81-168, two cases consolidated in the United States District Court for the District of Montana.

The only federal court yet to reach the issue of the constitutionality of "legislative veto" devices other than the United States Court of Appeals for the Ninth Circuit in *Chadha*, 634 F.2d 408 (1980), is the United States Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978). The 4-to-3 holding of the Court of Claims in that case was narrowly restricted (continued next page) many fully constitutional legislative and oversight mechanisms that Congress can use to achieve the goals of more effective review of executive action, including rules. In organic statutes, Congress can--and undoubtedly should--place specific and precise limits on the authority of agencies to issue rules. Moreover, Congress always can override unwise, inappropriate, burdensome or excessive agency rules with legislation. To the extent that the procedural hurdles within Congress which impede the enactment of legislation have fostered

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12/(cont'd) to the context of the Federal Salary Act, 2 U.S.C. § 359(1)(B)(1970). *See* 556 F.2d at 1059. Three of the seven judges forcefully disagreed with the *per curiam* opinion on the legislative veto device under consideration there. *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176 (1976)(declining to address the question of the validity of a one-House "legislative veto" provision in the Federal Election Campaign Act, 2 U.S.C. § 438(c), an issue not briefed by the United States); *id.* at 257 (White, J., concurring in part and dissenting in part)(concluding that the "legislative veto," at least as applied to so-called "independent agencies," not a usurpation of President's constitutional power); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir.)(declining to reach the issue of the constitutionality of the same provision of the Federal Salary Act that was at issue in *Atkins*, *supra*, on the ground that the provision was not "severable" from the rest of the statute and, therefore, even if the statute were held unconstitutional, plaintiff would have no right to additional pay), *cert. denied* 434 U.S. 1011 (1978); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.)(*en banc*) (declining to consider constitutionality of "legislative veto" provision of Federal Election Campaign Act on ground that issue not ripe for adjudication), *id.* at 678 (MacKinnon, J., dissenting) (concluding that the legislative veto provision is unconstitutional), *aff'd mem.* *sub nom.* *Clark v. Kimmitt*, 431 U.S. 950 (1977).

legislative veto proposals, Congress can adopt legislation assuring early floor consideration of bills overturning agency rules.

Congress also can authorize an agency to act for a limited period of time, thereby forcing the agency to return to Congress for authority to continue to act when its authorization expires. Congress can hold oversight hearings, at which explanations for agency rules that members of Congress may question can be sought and made part of a public record. Congress can adopt resolutions expressing its views that, while not legally binding upon the Executive Branch unless adopted pursuant to the plenary legislative process, can guide an agency in its implementation of the law. Further, Congress has authority to appropriate the money with which agencies execute the law. In appropriations statutes, Congress can provide for limitations on the expenditure of funds for certain purposes consistent with any other applicable legal requirements.

Another alternative is one that I understand originated in this Subcommittee last year. It is the proposal to create a Select Committee on Regulatory Affairs that would be given broad jurisdiction over the rulemaking activities of the federal government. By virtue of its broad jurisdiction, such a committee could investigate issues of regulatory overlap and duplication that presently prove difficult for standing committees to address.

The common themes underlying these several alternative methods by which Congress actively can review agency rules is that they do not displace the President and the Executive Branch in the execution of the law. They respect the principle of the separation of powers, as well as the presentation and bicameralism principles that apply to exercises of legislative power.

There should be no doubt regarding this Administration's concern about excessive and abusive agency actions. Indeed, the Administration has taken numerous steps to assure that agency rules are carefully considered and limited in the manner provided by Congress. If further oversight is necessary, we would support the use of joint resolutions providing for consideration by both Houses of Congress, presentation to the President and a Congressional override of any Presidential veto in the rare case in which it might occur. Such a method would include in the process all of the major elected officials in the national government. As you know, the President shares your concern that the costs and burdens of government must be diminished. Any mutual attempts to achieve this objective that do not strip the President of his constitutional power would be welcomed.

Conclusion

We respect the views of those members of Congress who disagree with us on the constitutional questions and we join in their desire for a reasonably prompt resolution of this dispute in the courts. In the meantime, we urge restraint against proposals that tend to rearrange the powers which our forefathers so carefully distributed among the three Branches.

The debate over legislative vetoes and alternative ways for Congress to oversee agency rules must be viewed in terms of the most basic structural underpinnings of our system of Government -- checks by the Legislature upon itself; the principle of bicameralism; checks by the President on the Congress in the form of presentment of legislation to him for veto or approval; and the separation of powers between Congress and the Executive Branch. The temptation to vest greater power in Congress and to exercise greater control over the Executive Branch should not provide the excuse for a major structural rearrangement in violation of these principles.

Each Branch seems inclined to rectify perceived abuses in the other two by expediencies that the Constitution will not tolerate. We must be ever mindful that the genius that created the precious system which has preserved our freedom for nearly two hundred years expressly eschewed remedies for temporary problems that pave a path for excessive domination by one Branch of Government.

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Attachment: An Appendix containing citations to articles about the legislative veto; to state court cases dealing with the subject (decided under state constitutional provisions, many of which are essentially similar to the federal constitutional provisions and thus are of general interest); and to federal statutes enacted since 1932 containing legislative veto provisions.

Appendix

I. *Articles about and Studies Relating to the Legislative Veto*

Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Ford. L. Rev. 638 (1956-57).

Bolton, J., *The Legislative Veto: Unseparating the Powers* (1977)

Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977)

Committee on Federal Legislation of the Ass'n of the Bar of the City of New York, *The Legislative Veto*, 34 Rec. Ass'n B. City N.Y. 208 (1979)

Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 Geo.Wash.L. Rev. 467 (1962)

Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 Western P.Q. 955 (1956)

Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. Rev. 423 (1978)

Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953)

Harris, J., *Congressional Control of Administration* (1964).

Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv. J. Legis. 735 (1979)

Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353 (1953)

Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. Rev. 455 (1977)

Keeffe, *The Legislative Veto: Now You See It, Now You Don't*, 63 A.B.A.J. 1296 (1977)

McGowan, *Congress, Court, and Control of Delegated Powers*, 77 Colum. L. Rev. 1119, 1133-62 (1977)

Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L. J. 367 (1977)

Millit & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 Pub. Ad. Rev. 176 (1941)

Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the 'Independent' Agencies*, 75 Nw. L. Rev. 1064, 1078-99 (1981)

Newman & Keaton, *Congress and the Faithful Execution of the Laws -- Should Legislators Supervise Administrators?*, 41 Calif. L. Rev. 565 (1953)

Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 Duke L.J. 285

Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. Rev. 1031 (1955)

Schwartz, *The Legislative Veto and the Constitution -- A Reexamination*, 46 Geo. Wash. L. Rev. 351 (1978).

Stewart, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976)

Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983 (1975)

II. State Court Cases Bearing on the General Issue of the Legislative Veto

Becker v. *Detroit Savings Bank*, 269 Mich. 432, 257 N.W. 853 (1934)

Hawks v. *Bland*, 156 Okl. 48, 9 P.2d 720 (1932)

In re. Opinion of the Justices to the Governor, 341 NE.2d 254 (Mass. 1976)

Moran v. *LaGuardia*, 270 N.Y. 450, 1 N.E.2d 961 (1936)

Mullen v. *State*, 114 Calif. 578, 46 P. 670 (1896)

Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950)

Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970)

Opinion of the Justices, 431 A.2d 783 (N.H. 1981)

People v. *Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929)

People ex rel. Burritt v. *Commissioners of State Contracts*, 120 Ill. 322, 11 N.E. 180 (1887).

Rowley v. *City of Medford*, 132 Or. 405, 285 P. 111 (1930)

Scudder v. *Smith*, 331 Pa. 165, 200 A 601 (1938)

State of Alaska v. *A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980)

State ex rel. Barker v. *Manchin*, 279 S.E.2d 622 (W.Va. 1981)

State ex rel. Judge v. *Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975)

State ex rel. Porterie v. *Grosjean*, 182 La. 298, 161 So. 871 (1935

State ex rel. Schneider v. *Bennett*, 219 Kan. 285, 547 P.2d 786 (1976)

State ex rel. Todd v. *Yelle*, 7 Wash. 2d 443, 110 P.2d 162 (1941)

State ex rel. Wisconsin's Environmental Decade, Inc. v. *Joint Comm. for Review of Administrative Rules*, 73 Wis. 2d 234, 243 N.W.2d 497 (1976)

Watrous v. *Golden Chamber of Commerce*, 121 Col. 521, 218 P.2d 498 (1950)

III. Federal Statutes Containing Legislative Veto and Related Provisions

A recent statistical survey prepared by the Congressional Research Service of the Library of Congress concluded that between 1932 and 1980, some *193* statutes containing legislative veto provisions were enacted. These statutes were said to contain *272* different legislative veto provisions. 1/ The vast majority of these provisions have been enacted in the past few years. The following lists of statutes are derived from reports prepared by the Congressional Research Service. 2/

1/ *See* C. Norton. *Statistical Summary of Congressional Approval and Disapproval Legislation*, 1932-1980 (Congressional Research Service, Sept. 14, 1981), at page 3. *See* note 3 *infra*.

2/ *See* *Powell* v. *McCormack*, 395 U.S. 486, 546-74 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."); *see also* S.Rep. No. 1335, 54th Cong., 1st Sess. 6 (1897).

A. Statutes Enacted from 1932 to 1975 [3]

1. Legislative Appropriations for Fiscal Year 1933 (P. L. 72-212)
2. Appropriations for Treasury and Post Office for Fiscal Year 1934 (P. L. 72-428)
3. Charges for Irrigation on Indian Reservation Projects, 1936 (P. L. 74-742)
4. Reorganization Act of 1939 (P. L. 76-19)
5. Neutrality Act of 1939 (54 Stat. Ch. 2, P. Res. 54)
6. Alien Registration Act of 1940 (P. L. 76-670)
7. Act to Promote Defense of the United States (P. L. 77-11)
8. Emergency Price Control Act (P. L. 77-421)
9. Emergency Price Control Act Amendment (P. L. 77-729)
10. War Labor Disputes Act (P. L. 78-89)
11. Navy Public Works Construction Authorization, 1944 (P. L. 78-289)
12. Naval Petroleum Reserve Amendment (P. L. 78-343)
13. Federal-Aid Highway Act of 1944 (P. L. 78-520)
14. Reorganization Act of 1945 (P. L. 79-263)
15. Federal Airport Act of 1946 (P. L. 79-377)
16. Strategic Materials Stockpiling Act Amendments, 1946 (P. L. 79-520)
17. Disposal of Surplus Vessels and other Naval Property, 1946 (P. L. 79-649)
18. Assistance to Greece and Turkey, 1947 (P. L. 80-75)
19. Displaced Persons Act of 1948 (P. L. 81-774)
20. Immigration Act Amendment of 1948 (P. L. 81-864)

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[3] Reproduced from C. Norton, Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority (Congressional Research Service, April 30, 1976), at pages 107-116. It should be noted that this list of 196 statutes includes some that do not contain legislative veto provisions as that term is used in this testimony, but rather contain provisions only calling for advance notification of Congress.

21. Long-Range Proving Ground for Guided Missiles, 1949 (P. L. 81-60)
22. Reorganization Act of 1949 (P. L. 81-109)
23. Government Printing and Binding Amendment, 1949 (P.L. 81-156)
24. Return of Rehabilitation Costs of Reclamation Projects, 1949 (P. L. 81-335)
25. Federal Civil Defense Act of 1950 (P. L. 81-920)
26. Universal Military Training and Service Act (P. L. 82-51)
27. Military and Naval Construction Authorization, 1951 (P. L. 82-155)
28. Immigration and Nationality Act of 1952 (P. L. 82-414)
29. Military and Naval Construction Authorization Act of 1952 (P. L. 82-534)
30. Supplementary Appropriations Act for Fiscal Year 1953 (P. L. 82-547)
31. Reorganization Act Amendment, 1953 (P. L. 83-3)
32. Interior Department Appropriations for Fiscal Year 1954 (P. L. 83-172)
33. Disposal of Government-Owned Rubber-Producing Facilities 1953 (P. L. 83-205)
34. Public Building Purchase Contract Act of 1954 (P. L. 83-519)
35. Watershed Protection and Flood Prevention Act, 1954 (P. L. 83-566)
36. Atomic Energy Act of 1954 (P. L. 83-703)
37. Internal Revenue Code of 1954 (P. L. 83-591)
38. Reorganization Act Amendment, 1955 (P. L. 84-16)
39. Department of Defense Appropriation Act For Fiscal Year 1956 (P. L. 84-157)
40. Federal-Aid Highway Act of 1956 (P. L. 84-627)

41. Authorizing Interchange of Agriculture and Defense Lands, 1956 (P. L. 84-804)

42. Small Reclamation Projects Act, 1956 (P. L. 84-984)

43. Watershed Protection and Flood Prevention Act Amendment, 1956 (P. L. 84-1018)

44. Contracts for Plans Affecting Exploration, Development and Use of Naval Petroleum Reserves (P. L. 84-1028)

45. Disposition of Naval Petroleum Reserves, 1956 (P. L. 84-1028)

46. Small Reclamation Projects Act Amendment, 1957 (P. L. 85-47)

47. Atomic Energy Act Amendment, 1957 (P. L. 85-79)

48. Reorganization Act Amendment, 1957 (P. L. 85-286)

49. Immigration and Nationality Act Amendments (P. L. 85-316)

50. Atomic Energy Act Amendment, 1958 (P. L. 85-479)

51. National Aeronautics and Space Act of 1958 (P. L. 85-568)

52. Defense Reorganization Act of 1958 (P. L. 85-599)

53. Atomic Energy Act Amendment, 1958 (P. L. 85-681)

54. Trade Agreements Extension Act of 1958 (P. L. 85-686)

55. Military Code Amendments, 1958 (P. L. 85-861)

56. National Aeronautics and Space Administration Authorizations for Fiscal Year 1959 (P. L. 86-12)

57. National Aeronautics and Space Administration Authorization for Fiscal Year 1960 (P. L. 86-45)

58. Public Buildings Act of 1959 (P. L. 86-249)

59. National Aeronautics and Space Administration Authorization for Fiscal Year 1961 (P. L. 86-481)

60. Military Construction Authorization Act, 1960 (P. L. 86-500)

61. Reorganization Act Amendment, 1961 (P. L. 87-18)

62. National Aeronautics and Space Administration Authorization for Fiscal Year 1962 (P. L. 87-98)

63. Foreign Assistance Act of 1961 (P. L. 87-195)

64. Mutual Educational and Cultural Exchange Act of 1961 (P. L. 87-256)

65. Government-Owned Utilities Used for Bureau of Indian Affairs, 1961 (P. L. 87-279)

66. Restoration to Indian Tribes of Unclaimed Payments, 1961 (P. L. 87-283)

67. Arms Control and Disarmament Act, 1961 (P. L. 87-297)

68. Department of Interior Appropriations for Fiscal Year 1963 (P. L. 87-578)

69. National Aeronautics and Space Administration Authorization for Fiscal Year 1963 (P. L. 87-584)

70. Surveys of Watershed Areas for Flood Prevention, 1962 (P. L. 87-639)

71. Independent Agencies Appropriations for Fiscal Year 1963 (P. L. 87-741)

72. Trade Expansion Act of 1962 (P. L. 87-794)

73. Naval Petroleum and Oil Shale Reserves, 1962 (P. L. 87-796)

74. Foreign Aid Appropriations for Fiscal Year 1963 (P. L. 87-872)

75. National Aeronautics and Space Administration Authorization for Fiscal Year 1964 (P. L. 88-113)

76. Independent Agencies Appropriations for Fiscal Year 1964 (P. L. 88-215)

77. Civil Rights Act of 1964 (P. L. 88-352)

78. Reorganization Act Amendment, 1964 (P. L. 88-351)

79. National Aeronautics and Space Administration Authorization for Fiscal Year 1965 (P. L. 88-369

80. Water Resources Research Act of 1964 (P. L. 88-379)

81. Atomic Energy Act Amendments, 1964 (P. L. 88-489)

82. Independent Agencies Appropriations for Fiscal Year 1965 (P. L. 88-507)

83. Agricultural Trade Development and Assistance Act Amendments, 1964 (P. L. 88-638)

84. Reorganization Act Amendment, 1965 (P. L. 89-43)

85. National Aeronautics and Space Administration Authorization for Fiscal Year 1966 (P. L. 89-53)

86. Independent Agencies Appropriations for Fiscal Year 1966 (P. L. 89-128)

87. Authorizing Construction, Repair and Preservation of Certain Public Works, 1965 (P. L. 89-298)

88. Watershed Protection and Flood Prevention Act Amendment, 1965 (P. L. 89-337)

89. Water Resources Research Act Amendments, 1966 (P. L. 89-404)

90. National Aeronautics and Space Administration Authorization for Fiscal Year 1967 (P. L. 89-528)

91. Title 5, United States Code, "Government Organization and Employees" (P. L. 89-554)

92. Independent Agencies Appropriations for Fiscal Year 1967 (P. L. 89-555)

93. Interior Department Research Contracts, 1966 (P. L. 89-672)

94. Postmaster General Extension of Leasing Authority, 1967 (P. L. 90-15)

95. National Aeronautics and Space Administration Authorization for Fiscal Year 1968 (P. L. 90-67)

96. Independent Agencies Appropriations for Fiscal Year 1968 (P. L. 90-121)

97. Postal Revenue and Federal Salary Act of 1967 (P. L. 90-206)

98. Treasury and Post Office Appropriations for Fiscal Year 1969 (P. L. 90-350)

99. National Aeronautics and Space Administration Authorization for Fiscal Year 1969 (P. L. 90-373)

100. The Wild and Scenic Rivers Act, 1968 (P. L. 90-542)

101. Independent Agencies Appropriations for Fiscal Year 1969 (P. L. 90-550)

102. Reorganization Act Extension Amendment (P. L. 91-5)

103. Treasury and Post Office Appropriations for Fiscal Year 1970 (P. L. 91-74)

104. National Aeronautics and Space Administration Authorization for Fiscal Year 1970 (P. L. 91-119)

105. Authorization of Appropriations for Armed Forces, 1970 (P. L. 91-121)

106. Independent Agencies Appropriations for Fiscal Year 1970 (P. L. 91-126)

107. Military Construction Authorization, 1970 (P. L. 91-142)

108. Foreign Assistance Appropriations Act, 1970 (P. L. 91-194

109. Public Health Cigarette Smoking Act, 1970 (P. L. 91-222)

110. Elementary and Secondary Education Assistance Program Extension (P. L. 91-230)

111. National Traffic and Motor Vehicle Safety Act Amendments (P. L. 91-265)

112. National Aeronautics and Space Administration Authorization for Fiscal Year 1971 (P. L. 91-303)

113. Defense Producation Act of 1950 Amendment (P. L. 91-379)

114. Treasury and Post Office Appropriations for Fiscal Year 1971 (P. L. 91-442)

115. Armed Forces Authorization, 1971 (P. L. 91-441)

116. Military Construction Authorization, 1971 (P. L. 91-511)

117. Independent Offices and Department of Housing and Urban Development Appropriations for Fiscal Year 1971 (P. L. 91-556)

118. River and Harbor and Flood Control Acts, 1970 (P. L. 91-611)

119. Federal Pay Comparability Act of 1970 (P. L. 91-656)

120. Treasury Postal Service, Executive, and Independent Office Appropriations for Fiscal Year 1972 (P. L. 92-49)

121. National Aeronautics and Space Administration Authorization for Fiscal Year 1972 (P. L. 92-68)

122. National Science Foundation Authorization, 1972 (P. L. 92-86)

123. Military Construction Authorization, 1972 (P. L. 92-145)

124. Armed Forces Authorization, 1972 (P. L. 92-156)

125. Executive Reorganization Plans Extension, 1971 (P. L. 92-179)

126. Foreign Assistance Act of 1972 (P. L. 92-226)

127. National Aeronautics and Space Administration Authorization for Fiscal Year1973(P. L. 92-304)

128. Second Supplemental Appropriations Act for Fiscal Year 1972 (P. L. 92-306)

129. Public Buildings Amendments of 1972 (P. L. 92-313)

130. Education Amendments of 1972 (P. L. 92-318)

131. Treasury, Postal Service, Executive, and Independent Offices Appropriations for Fiscal Year 1973 (P. L. 92-351)

132. National Science Foundation Authorization, 1973 (P. L. 92-372)

133. Rural Development Act of 1972 (P. L. 92-419)

134. Dwight D. Eisenhower Memorial Bicentennial Civic Center Act, 1972 (P. L. 92-520)

135. Military Construction Authorization, 1973 (P. L. 92-545)

136. Pennsylvania Avenue Development Corporation Act of 1972 (P. L. 92-578)

137. National Aeronautics and Space Administration Authorization for Fiscal Year 1974 (P. L. 93-74)

138. National Science Foundation Authorization for Fiscal Year 1974 (P. L. 93-96)

139. Department of Interior Appropriations for Fiscal Year 1974 (P. L. 93-120)

140. Indian Claims Judgments Funds, 1973 (P. L. 93-134)

141. Treasury, Postal Service and General Government Appropriations for Fiscal Year 1974 (P. L. 93-143)

142. War Powers Resolution (P. L. 93-148)

143. Amendments to the Mineral Leasing Act of 1920 (P. L. 93-153)

144. Department of Defense Authorizations, 1974 (P. L. 93-155)

145. Emergency Petroleum Allocation Act of 1973 (P. L. 93-159)

146. Military Construction Authorization, 1974 (P. L. 93-166)

147. Foreign Assistance Act of 1973 (P. L. 93-189)

148. Menominee Restoration Act (P. L. 93-197)

149. District of Columbia Self-Government Act, 1973 (P. L. 93-198)

150. Comprehensive Employment and Training Act of 1973 (P. L. 93-203)

151. Regional Rail Reorganization Act of 1973 (P. L. 93-236)

152. Foreign Assistance Appropriations for Fiscal Year 1974 (P. L. 93-240)

153. Supplemental Appropriations Act, 1974 (P. L. 93-245)

154. Public Works, Rivers and Harbors and Flood Control Authorizations, 1974 (P. L. 93-251)

155. Wild and Scenic Rivers Act Amendments, 1974 (P. L. 93-279)

156. National Aeronautics and Space Administration Authorization for Fiscal Year 1975 (P. L. 93-316)

157. Congressional Budget and Impoundment Control Act of 1974 (P. L. 93-344)

158. Department of Defense Authorizations for 1975 (P. L. 93-365)

159. Air Transportation Security Act of 1974 (P. L. 93-366)

160. Atomic Energy Act Amendments, 1974 (P. L. 93-377)

161. Forest and Rangeland Renewable Resources Planning Act of 1974 (P. L. 93-378)

162. Education Amendments of 1974 (P.L. 93-380)

163. Department of Interior and Related Agencies Appropriations for Fiscal Year 1975 (P. L. 93-404)

164. Employees Retirement Income Security Act of 1974 (P. L. 93-406)

165. National Science Foundation Authorization for Fiscal Year 1975 (P. L. 93-413)

166. Conveyance of Submerged Lands to Guam, Virgin Islands and American Samoa (P. L. 93-435)

167. Big Thicket National Preserve (P. L. 93-439)

168. Atomic Energy Act Amendments, 1974 (P. L. 93-485)

169. Motor Vehicle and School bus Safety Amendments of 1974 (P. L. 93-492)

170. Presidential Recordings and Materials Preservation Act, 1974 (P. L. 93-526)

171. Hopi and Navajo Tribe Act (P. L. 93-531)

172. Military Construction Authorization, 1975 (P. L. 93-552)

173. Foreign Assistance Act of 1974 (P. L. 93-559)

174. Federal Nonnuclear Energy Research and Development Act of 1974 (P. L. 93-577)

175. Trade Act of 1974 (P. L. 93-618)

176. Grand Canyon National Park Enlargement Act (P. L. 93-620)

177. Headstart, Economic Opportunity and Community Partnership Act of 1974 (P. L. 93-644)

178. Export-Import Bank Amendments of 1974 (P. L. 93-646)

179. Foreign Assistance Appropriations for Fiscal Year 1975 (P. L. 94-11)

180. Amtrak Improvement Act of 1975 (P. L. 94-25)

181. Trust Territory of the Pacific Islands Amendments Act (P. L. 94-27)

182. National Aeronautics and Space Administration Authorization for Fiscal Year 1976 (P. L. 94-39)

183. National Science Foundation Authorization for Fiscal Year 1976 (P. L. 94-86)

184. Amendment to Social Security Act Child Support Provisions (P. L. 94-88)

185. Board for International Broadcasting Authorization for Fiscal Year 1976 (P. L. 94-104)

186. Department of Defense Authorization for Fiscal Year 1976 (P. L. 94-106)

187. Military Construction Authorization for Fiscal Year 1976 (P. L. 94-107)

188. Sinai Early Warning System Agreement (P. L. 94-110)

189. Older American Amendments of 1975 (P. L. 94-135)

190. Foreign Relations Authorization for Fiscal Year 1976 (P. L. 94-141)

191. Education for All Handicapped Children Act of 1975 (P. L. 94-142)

192. International Development and Food Assistance Act of 1975 (P. L. 94-161)

193. Energy Policy and Conservation Act (P. L. 94-163)

194. Department of Interior and Related Agencies Appropriations for Fiscal Year 1976 (P. L. 94-165)

195. Energy Research and Development Administration Authorization Act (P. L. 94-187)

196. Home Mortgage Disclosure Act of 1975 (P. L. 94-200)

B. Statutes Enacted in 1976 and 1977 4/

1. Amendments to the Civil Government of the Trust Territory of the Pacific Islands (P. L. 94-255; approved April 1, 1976).
2. Naval Petroleum Reserves Production Act (P. L. 94-258; approved April 5, 1976).
3. Fishery Conservation and Management Act of 1976 (P. L. 94-265; approved April 13, 1976).
4. Federal Election Campaign Act Amendments of 1976 (P. L. 94-283; approved May 11, 1976).
5. International Security Assistance and Arms Export Control Act of 1976 (P. L. 94-329; approved June 30, 1976).
6. Foreign Assistance and Related Programs Appropriations for 1976 (P. L. 94-330; approved June 30, 1976).
7. Department of Transportation and Related Appropriations Act, 1978 (P. L. 95-85; approved August 2, 1977).
8. Energy Conservation and Production Act (P.L. 94-385; approved August 14, 1976).
9. D.C. Government Financial Condition Audit Act (P. L. 94-399; approved September 4, 1976).
10. National Emergencies Act (P. L. 94-412; approved September 14, 1976).
11. Food and Agriculture Act of 1977 (P. L. 95-113; approved September 29, 1977).
12. Veterans' Education and Employment Assistance Act of 1976 (P. L. 94-502; approved October 15, 1976).

4/ From C. Norton, 1976-1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions (Congressional Research Service, May 25, 1978), at pages 1-12. Part B includes only new statutes identified in the foregoing report as containing legislative veto provisions (not statutes with advance notification provisions).

13. National Park System Authorization Act (P. L. 94-578; approved October 21, 1976).

14. Federal Land Policy and Management Act of 1976 (P. L. 94-579; approved October 21, 1976).

15. Alaska Natural Gas Transportation Act of 1976 (P. L. 94-586; approved October 22, 1976).

16. Reorganization Act of 1977 (P. L. 95-17; approved April 6, 1977).

17. Emergency Unemployment Compensation Extension Act of 1977 (P. L. 95-19; approved April 12, 1977).

18. Export Administration Amendments of 1977 (P.L. 95-52; approved June 22, 1977).

19. International Navigational Rules Act of 1977 (P. L. 95-75; approved July 27, 1977).

20. International Security Assistance Act of 1977 (P. L. 95-92; approved August 4, 1977).

21. Public Works and Energy Research Appropriation Act, 1978 (P. L. 95-96; approved August 7, 1977).

22. Social Security Amendments of 1977 (P. L. 95-216; approved December 20, 1977).

23. Wartime or National Emergency Presidential Powers (P. L. 95-223; approved December 28, 1977).

C. Statutes Enacted in 1978 5/

1. Department of Energy Act of 1978 (P. L. 95-238; approved Feb. 25, 1978).

5/ From C. Norton, 1978 Congressional Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions (Congressional Research Service, Feb. 12, 1979), at pages 1-15. Part C only includes new statutes identified in the foregoing report as containing legislative veto provisions.

2. Nuclear Non-Proliferation Act of 1978 (P. L. 95-242; approved March 10, 1978).

3. District of Columbia Appropriations Act of 1978 (P. L. 95-288; approved June 5, 1978).

4. Petroleum Marketing Practices Act (P. L. 95-297, approved June 19, 1978).

5. Emergency Interim Consumer Product Safety Standard Act of 1978 (P. L. 95-319; approved July 11, 1978)

6. Department of Transportation and Related Agencies Appropriations Act for 1979 (P. L. 95-335; approved August 4, 1978).

7. New York City Loan Guarantee Act of 1978 (P. L. 95-339; approved August 8, 1978).

8. Outer Continental Shelf Lands Act Amendments of 1978 (P. L. 95-372; approved Sept. 18, 1978).

9. District of Columbia Appropriations Act for 1979 (P. L. 95-373; approved September 18, 1978).

10. International Security Assistance Act of 1978 (P. L. 95-384; approved Sept. 26, 1978).

11. Futures Trading Act of 1978 (P. L. 95-405; approved September 30, 1978).

12. Amtrak Improvement Act of 1978 (P. L. 95-421; approved October 5, 1978).

13. International Development and Food Assistance Act of 1978 (P. L. 95-424; approved October 6, 1978).

14. Civil Service Reform Act of 1978 (P. L. 95-454; approved October 13, 1978).

15. Amendment to the Internal Revenue Code of 1954 (P. L. 95-502; approved October 21, 1978).

16. Airline Deregulation Act of 1978 (P. L. 95-504; approved October 24, 1978).

17. Full Employment and Balanced Growth Act of 1978 (P. L. 95-523; approved October 27, 1978).

18. Housing and Community Development Amendments of 1978 (P. L. 95-557; approved October 31, 1978).

19. Education Amendments of 1978 (P. L. 95-561; approved November 1, 1978).

20. Surface Transportation Assistance Act of 1978 (P. L. 95-599; November 6, 1978).

21. Public Utility Regulatory Policies Act of 1978 (P. L. 95-617; approved November 9, 1978).

22. Natural Gas Policy Act of 1978 (P. L. 95-621; approved November 9, 1978).

23. National Parks and Recreation Act of 1978 (P. L. 95-625; approved November 10, 1978).

D. Statutes Enacted in 1979 6/

1. Veterans' Health Care Amendments of 1979 (P. L. 96-22; approved June 13, 1979).

2. Department of State Authorizing Act, Fiscal Years 1980 and 1981 (P. L. 96-60; approved August 15, 1979).

3. Energy and Water Development Appropriations for Fiscal Year 1980 (P. L. 96-69; approved September 25, 1979).

4. Treasury, Postal Service and General Government Appropriations Act, 1980 (P. L. 96-74; approved September 29, 1979).

5. Export Administration Act of 1979 (P. L. 96-72; approved September 29, 1979).

6/ From C. Norton, 1979 Acts Authorizing Congressional Approval or Disapproval, or Requiring Advance Notification, of Proposed Executive Actions, Rules and Regulations (Congressional Research Service, April 17, 1980), at pages 1-14. Part D only includes new statutes identified in the foregoing report as containing legislative veto provisions.

6. Health Planning and Resources Development Amendments of 1979 (P. L. 96-79; approved October 4, 1979).

7. Department of Education Organization Act (P. L. 96-88; approved October 17, 1979).

8. Emergency Energy Conservation Act of 1979 (P. L. 96-102; approved November 5, 1978).

9. District of Columbia Retirement Reform Act (P. L. 96-122; approved November 17, 1979).

10. Department of Interior and Related Agencies Appropriations for Fiscal Year 1980 (P. L. 96-126; approved November 27, 1980).

11. Department of Interior and Related Agencies Appropriations for F.Y. 1980 (P. L. 96-126; approved November 27, 1979).

12. Department of Justice Authorization Act, Fiscal Year 1980 (P. L. 96-132; approved November 30, 1979).

13. Veterans' Health Program Extension and Improvement Act of 1979 (P. L. 96-151; approved December 20, 1979).

E. Statutes Enacted in 1980 7/

1. Federal Election Campaign Act Amendments of 1979 (P. L. 96-187; approved January 8, 1980).

2. United States Insular Areas Appropriation Authorization (P.L. 96-205; approved March 12, 1980).

3. Crude Oil Windfall Profit Tax Act of 1980 (P.L. 96-223; approved April 2, 1980).

4. Extension of the Reorganization Authority of the President (P.L. 96-230; approved April 18,1980).

5. Civil Rights of Institutionalized Persons Act (P.L. 96-247; approved May 23, 1980).

7/ From a list of statutes with legislative veto provisions supplied by C. Norton, Government Division, Congressional Research Service.

6. Federal Trade Commission Improvements Act of 1980 (P.L. 96-252; approved May 28, 1980).

7. Energy Security Act (P.L. 96-294; approved June 30, 1980).

8. Marine Protection Research and Sanctuaries Authorization Act (P.L. 96-332; approved Aug. 29, 1980)

9. Multiemployer Pension Plan Amendments Act of 1980 (P.L. 96-364; approved September 26, 1980).

10. Energy and Water Development Appropriations Act, 1981 (P.L. 96-367; approved October 1, 1980).

11. Education Amendments of 1980 (P.L. 96-374; approved October 3, 1980).

12. Coastal Zone Management Improvement Act of 1980 (P.L. 96-464; approved October 17, 1980).

13. Solid Waste Disposal Act Amendments of 1980 (P.L. 96-482; approved October 21, 1980).

14. Alaska National Interest Lands Conservation Act (P.L. 96-487; approved December 2, 1980).

15. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510; approved December 11, 1980).

16. Department of Interior and Related Agencies Appropriations, 1981 (P.L. 96-514; approved December 12, 1980.

17. National Historic Preservation Act Amendments of 1980 (P.L. 96-515; approved December 12, 1980).

18. Housing and Urban Development Appropriations, 1981 (P.L. 96-526; approved December 15, 1980).

19. International Security and Development Cooperation Act (P.L. 96-533; approved December 16, 1980).

20. Federal Insecticide, Fungicide and Rodenticide Act (P.L. 96-539; approved December 17, 1980).

21. Farm Credit Act Amendments of 1980 (P.L. 96-592; approved December 24, 1980).

Mr. MOAKLEY. Thank you very much, Mr. Olson.

Mr. HALL. Mr. Chairman?

Mr. MOAKLEY. Mr. Hall.

Mr. HALL. I have always liked the idea of the legislative veto, but I am not sure that it has worked very well in the legislative process, especially in the State legislatures.

I served in the Ohio Legislature for about 10 years and, while not being a student of the legislative veto, it was my experience that the only time we ever used it was as a result of a special interest group or a group that had some power or influence that was able to bring an issue to our attention. And I suspect, because of the even busier schedule that we have in Congress, the only way it could be used properly is if we went to a biennial budget—if we had a budget the first year and the second year we had oversight.

But I would hope that maybe this committee would study some of the State legislatures that have a legislative veto and see how that really has worked. It has always been my impression that it did not. I have had mixed feelings on the legislative veto ever since it came up—and it has come up almost annually.

As Congressmen, we are always catching heck for the bureaucracy, so we ought to have a chance to say something about it. Yet do we have the time to get into it? Do we want that influence? My point is that it has been used because a group was powerful or had influence and was able to bring it to our attention.

I am sorry I do not have a question, but if I can make one point I would hope that the staff might look at the State legislatures and see what has happened with the legislative veto and see if in fact it has worked. I am not sure.

Mr. RHODES. Mr. Chairman?

Mr. MOAKLEY. Mr. Rhodes.

Mr. RHODES. Mr. Olson, it strikes me that the legislative veto on certain grounds might be constitutional and on other grounds might not be constitutional; I am thinking particularly of a veto on the basis that there had been a violation of legislative intent, when a regulation was promulgated. I think you could make a case that legislative intent is a continuing concern of the legislative body and the legislation process doesn't necessarily end when the bill is passed and signed by the President, that there is a continuing responsibility, and that it can be exercised by a legislative veto with the proper showing of violation of legislative intent.

What is your reaction to that?

Mr. OLSON. I have two reactions, or perhaps three. I understand and agree completely that it is a continuing responsibility of this body to be concerned about legislative intent and that a violation of legislative intent by an executive branch department or an agency is a serious matter which should be rectified. In 15 years of private practice I had many occasions to litigate against both the State and Federal Government in situations in which I felt administrative agencies had violated legislative intent. However, once a rule is enacted by an agency or promulgated by an agency, it has a binding legal effect on the public and withdrawing, repealing or reversing that rule is, in a very real sense, legislation.

Such action has legislative effect because it is changing the law; it is changing a rule which has been legally adopted by an agency pursuant to discretion granted to it. In that sense it is changing the law and would be subject, in my judgment, to the bicameralism provisions and other provisions of article I with respect to legislative matters. Another remedy, if legislative intent was exceeded, is in the courts, but the legislative cannot exercise judicial functions.

Mr. **Rhodes**. Before you leave that, don't you think there is possibly some validity to the argument that the exercise of the power to regulate is to regulate in accordance with the intent of the Congress? And if the regulation does not carry out the intent, it isn't a valid regulation and therefore is not the—the act of veto would not be upsetting a legal regulation?

Mr. **Olson**. That leads me to my second point, which is the action of the legislative veto in that area is invading the territory and responsibility of the judicial branch to determine whether any exercise of Executive power, whether a purely executive action or a quasilegislative action, is consistent with the statute by which the power was given to the executive body to begin with.

Mr. **Rhodes**. You are certainly aware of the fact that there is no provision in the Constitution which says that the judicial system may interpret laws; it is done because the court does it, but there is no constitutional provision for that.

Also, what body could be better equipped to judge legislative intent than the legislative body which enacted the law in the first place?

Mr. **Olson**. In the first place the occasion for doing so would usually occur in a subsequent Congress, not the Congress that acted initially. I appreciate the fact that there are residual members, carried over from Congress to Congress, but different considerations prevail.

Second, I do believe that the responsibility of the courts is to adjudicate, which means to apply and interpret the law. And I do believe, Congressman, that repealing such a law would have a legislative effect, and unless it is accomplished either by a legislative act of this body—or by a court—it is not consistent with the separation of powers. Until reversed, the rule is binding upon the people, and for Congress to change it is a legislative act which must comport with the requirements of article I as to the procedure by which it may be accomplished.

Mr. **Rhodes**. I imagine you would agree with me in practically every instance, I can't think of anywhere it would be otherwise, if the Congress was dissatisfied with the regulation, by passing the appropriate legislation it could, either by repealing the basic law or by amending it in such a way as to make congressional intent clearer, could in effect nullify the regulation, assuming that the law is passed and the President signs it.

Now, if the President does not sign it, of course the Constitution gives the Congress power to override his veto by a two-thirds vote. What would you say to cutting across the corner a little bit and providing that a legislative veto would have to be accomplished by two-thirds vote, which is exactly the same vote that you would have if you were to override a veto?

Mr. **Olson**. Are you talking about a two-thirds vote, a joint resolution, but not submitting it to the Congress?

Mr. **Rhodes**. Not submitting it to the President.

Mr. OLSON. Excuse me, not submitting it to the President? I would have to look at that. That is one I had not considered.

Mr. RHODES. I hadn't either.

Mr. OLSON. There is an interesting analogy in the Constitution because one action that is not required to be submitted to the President is action pursuant to article V of the Constitution. Proposals which emanate from Congress to amend the Constitution must be passed by two-thirds vote of both Houses. They do not have to be submitted to the President and such proposals are, of course valid actions of this body.

Your suggestion is analogous to that. It is a very interesting proposition. Before I gave any kind of definitive response, I would like to think about that more. Of course, any response I would give at this moment would not carry a great deal of weight anyway.

Mr. RHODES. I would certainly be glad to have you think about it. I would hope that we would leave the record open so that if Mr. Olson wants to respond further to the question, he might do so.

Mr. MOAKLEY. Yes.

Mr. TAYLOR. Will you yield?

Mr. RHODES. Yes.

Mr. TAYLOR. Mr. Olson, I certainly think there is a lot of logic in your statement. I think the separation of powers doctrine is something we are all aware of and we should become more aware of. However, I think when we talk about the intent of our Founding Fathers, we need to remember that they did not envision this vast bureaucracy which we have created.

You are exactly right when you say this regulatory authority is given to the executive branch on each and every piece of legislation. The last paragraph of most legislation says Secretary of Agriculture, DOT, whoever, "shall promulgate such rules and regulations necessary to carry out the intent of the act." And then they write the regulations.

The thing that bothers me and bothers the American people is that there is such a hemorrhage of regulations, that we have stripped away the freedom of our people and have Americans in violation of some regulation, pursuant to law they didn't know existed until they are hit with it, boom. The only recourse they have is through their legislative branch. What are you going to do about the Federal Trade Commission that sits here in Washington and cranks out all kinds of rules carrying the force of legislation on everything conceivable, trying to control funeral directors, warranties on used cars.

I had a guy down the other day from the Department of Transportation and he was promulgating a regulation for a rural mailbox. Now this idea for mailboxes was one that if you hit it, it would collapse. They were proposing, and I happen to be ranking on the Postal Operations Subcommittee, that we, the Congress, try to get the Post Office to mandate this type of rural mailbox.

Can you think of anything that would come nearer starting a revolution, a revolution that couldn't be won, than to go out and tell 37 million farmers in the rural free delivery system, "You are going to have to tear down your mailbox and buy one of these Government-regulated mailboxes?" This is an example of the problem we are faced with in dealing with regulations.

Mr. **Olson**. I agree.

Mr. **Taylor**. I am sure that when we passed the Occupational Safety and Health law that it did not require you to have a horn on a wheelbarrow, but it is in the regulations that they wrote. What are you going to do about it?

Mr. **Olson**. You are preaching to the converted. I agree with you——

Mr. **Taylor**. I have been unable to get the bureaucracy to do anything about it. You can't change those guys. When they write one of their regulations, it is written on a tablet of stone. The only thing I can see is let the representatives of the people, who are catching hell for all this stuff, do something about it.

Mr. **Olson**. I agree with that, I agree with you completely. There is no doubt in my mind that the President agrees with you completely and the President is doing many things to address precisely that kind of problem.

I agree that pressure is put on you and the other Members of Congress with respect to matters such as this. Unfortunately, I do not think, based upon my views of the Constitution, that there is a shortcut that avoids the process of legislation. As I mentioned earlier, and as the chairman noted at the beginning, there has been over the years too much delegation of power and the delegation of power that has occurred has been too broad and has not been properly limited.

I think that subject is being addressed now and must continue to be addressed. One response is to narrow the discretion that is given and to put limits on the exercise of precisely those types of power. I believe that that should be done.

The President is doing everything he can to put people in those positions in the agencies who will not abuse that responsibility and authority, but in some areas some changes in the organic legislation may be appropriate.

Mr. **Taylor**. I agree, I think he is. I applaud him for it.

I noticed the Federal Register isn't near as thick as it used to be, and I am glad of that. But this mailbox thing came out of the Department of Transportation, not Jimmy Carter. So somebody is still down there writing them, you know.

You know the bureaucracy——

Mr. **Moakley**. Hasn't found him yet?

Mr. **Taylor**. No.

You know, a bureaucrat is not so expensive because of what we pay him; he is kind of like a cockroach loose in the kitchen, what he gets into and messes up is what causes the trouble.

These are problems that the American people are concerned with. We talk about the Founding Fathers, the Federalist papers and the Declaration of Independence. I remember one of the tyrannies there, one of the grievances set forth by the colonies in the Declaration of Independence was, in addressing themselves to the problems that they had was not only taxation without representation, but also they said that the "king has erected a multitude of New Offices and sent hither swarms of officers to harass our people and eat out their substance."

I wonder if we haven't come back to that place in time. The President is trying to do something about it, but I think the concern of Congress as expressed in these vetoe proposals is a result of what I pointed out. Not a day goes by that we don't get hit with what some bureaucrat does.

Mr. **Moakley**. We have a rollcall and about 5 minutes to make it.

Mr. Olson, will you be present when we come back?

Mr. **Rhodes**. I understand the vote is on the previous question, so there may be two votes.

Mr. **Moakley**. All right.

The subcommittee stands in recess until we find ourselves back here in this room.

[A brief recess was taken.]

Mr. **Moakley**. The committee will resume.

It appears that we are going to have recorded votes from time to time. We really apologize to the witnesses who have made their time available to us. We will try to complete our questioning as quickly as we can so we won't hold you up. We know how valuable your time is.

Gene, do you have any questions?

Mr. **Taylor**. I have already said too much, Mr. Chairman.

Mr. **Moakley**. Actually, referring to what Gene was saying, I think many of our problems with the bureaucracy probably begin here in the Congress. We make our legislative mandates so ambiguous and wide open; when you give OSHA a one-line mandate that says "Provide a safe workplace," you can imagine what the bureaucracy can do with that.

I think the problem really rests here in Congress when we draft the initial legislation. The reason some of that statutory language is so vague is that if you made it any tighter you couldn't get the bill reported from committee. Everybody is hedging to get the legislation through.

I enjoyed your statement. I thought it was very well done.

One question comes to my mind. You were talking about veto of a regulation. What about a veto of a proposed regulation, how would you feel about that?

Mr. **Olson**. I understand several pending measures in this Congress would cast virtually any rule in the form of a proposed rule. The fact is that what Congress would be doing when it dealt with the "proposed" rule is allowing it to pass either by not vetoing it or preventing it from becoming law by vetoing it, which is the performance of a lawmaking function. That is embraced within the testimony that I submitted; it is lawmaking. It cannot be distinguished from lawmaking.

It is a decision by this body as to whether a rule or a regulation or an implementation of a law will go into effect and become the law of this Nation. If that is lawmaking, and I believe it to be lawmaking, then it must be done by both Houses of Congress and then submitted to the President.

Mr. **Moakley**. Aren't we just maintaining the status quo in a situation like that?

Mr. **Olson**. That is an argument that people make but I am not persuaded by it because it is deciding whether or not something will go forward. If it is to go forward by inaction by the Congress or acquiescence by one body of Congress, which some of these proposed bills contemplate, that is nonetheless the lawmaking process. And the veto of something that is determined by an agency which you have given the authority to make a binding law, by stopping or preventing the implementation of a statute, is also lawmaking.

For example, a statute could give the agency a mandate to do something and then give the agency a mandate to implement the doing of it through rules, and by stopping the formulation of those rules the Congress could then be stopping the implementation of the statute, which is not only participation in the executive or execution of the statute, but it is in a sense repealing the statute, which, if another Congress comes along and does—or even the same Congress does—must be done in the same way that legislation is done.

Repealing of a law, in my judgment, is the same as making a law. While I have heard that argument made and it is made by some of the supporters of some types of legislative vetoes, from a constitutional standpoint I do not think it makes any difference. I think it is more of a label and it does not answer the structural considerations.

Mr. MOAKLEY. Would your answer be the same if there were a delaying mechanism that would enable the Congress to have a look at the proposed law before it went into effect?

Mr. OLSON. Yes, it would be; although that is not nearly as egregious from a constitutional standpoint.

My answer would be the same except to the proposal that I think was considered as part of this committee's work last year, that the rule would be automatically delayed or would be delayed by the committee action or a committee resolution or House resolution unless the agency insisted on going forward and provided an explanation for its action and then Congress could stop it by legislation.

That type of mechanism, as I mentioned at the conclusion of my prepared remarks, would be constitutional. But if it is a one-House or committee suspending, without more, the operation of a statutory enactment pursuant to power vested in an agency, I think it would be subject to the same constitutional objections.

Mr. RHODES. Would you yield at that point?

Mr. MOAKLEY. Yes, John.

Mr. RHODES. Suppose the basic law when it is passed and signed by the President has provision that any regulation promulgated on the basis of the law would not take effect until 30 days or 60 days or whatever after promulgation and not take effect at all if either House, let's say for the sake of argument, of the Congress were to disapprove it?

Mr. OLSON. That in my judgment is subject to the same objections that I enumerated in my testimony.

Mr. RHODES. No; it is a different case, because the President would have signed the basic law with that proviso in that.

Mr. OLSON. That is an argument that also has been made before. It turns on the fact that the President may have signed the basic law—various Presidents have signed something in the neighborhood of 200 bills containing legislative vetos and some have been passed over a Presidential veto.

Neither this body nor the President can make a law constitutional either because it was passed by this body or signed by the President. We cannot amend the Constitution by our joint collaboration. So I do not think that answers the constitutional questions, Congressman.

Mr. **Rhodes**. Good answer.

Mr. **Olson**. Thank you.

Mr. **Moakley**. I think you made a distinction between a legislative veto of executive regulatory agencies as opposed to independent regulatory agencies. Did you?

Mr. **Olson**. On the constitutional issues, no; I do not. In fact, in some respects, in my judgment, the potential evil with respect to independent regulatory agencies can be greater, because that is a strange, somewhat unusual, concept to begin with under the Constitution. And the legislative veto with respect to the actions of independent agencies tends to eliminate the President's power to execute the laws almost completely. He does have a power to implement and participate in the actions of independent regulatory agencies through the appointment process, but if you add on top of the appointment process the legislative veto provisions with respect to what every independent agency does, then you are in a sense weakening and maybe diminishing to virtually nothing the power of the President when he selects persons to appoint who he thinks will be implementing his policies, because they no longer will be his policies after the appointment is done. It will be the policies of that agency out in nowhere-land.

Mr. **Moakley**. Isn't that the purpose of the independent agencies, to be independent from the executive?

Mr. **Olson**. Well, they cannot be so independent that they are completely removed under our constitutional scheme from the power of the President to participate in the execution of the laws through the appointment of people to those bodies. That is one of the fundamental considerations which allows the courts to uphold the creation of the independent agencies and to give them so much power in the first place.

If we get them too far removed from the three coordinate branches of government, I think we have created something extraconstitutional that I do not think would be upheld.

Mr. **Moakley**. Mr. Beilenson, do you have any questions?

Mr. **Beilenson**. I do not.

I do want to say I think Mr. Olson's statement was excellent in every respect. I, for one, appreciate all the time and effort that he and his staff obviously put into it. I say this perhaps because I agree with him. I really think it was an excellent statement of principles.

Mr. **Rhodes**. Will the gentleman yield?

I agree. Very well done. I am not convinced, but it was very well done.

Mr. **Olson**. Perhaps we can do better.

Thank you.

Mr. **Moakley**. I think the entire committee agrees that the statement was very well presented. We understand what went into the preparation and deliberation.

Mr. **Beilenson**. It is very nice, Mr. Chairman, that the gentleman and his people obviously took seriously our asking their further opinion on this very important matter. It has been very, very helpful to all of us.

Mr. TAYLOR. I, too, would like to say I appreciate your statement. I think it was very well done, and very informative. I intend to read it again because I think you make some points that really need to be studied further.

Mr. OLSON. I appreciate that.

Mr. MOAKLEY. As Mr. Rhodes suggested, if you want to elaborate further on any questions or if you want to supply additional material to the committee, we will hold the record open for you.

Mr. OLSON. Thank you.

Mr. MOAKLEY. Thank you very much.

At this time the committee will hear from Alan Morrison, director, and Carolyn Brickey, staff attorney with the Litigation Group, Congress Watch.

STATEMENTS OF ALAN MORRISON, DIRECTOR AND CAROLYN BRICKEY, STAFF ATTORNEY, LITIGATION GROUP, CONGRESS WATCH

Mr. MORRISON. We are pleased to have been afforded this opportunity to discuss with you the various proposals under which the Congress could veto regulations issued by the executive branch, including the independent regulatory agencies, by methods short of the full legislative process. There can be no doubt the Congress has the power, by utilizing the procedures spelled out in the Constitution for enacting legislation, to overrule any agency's action simply by amending the statutory authority on which it is based. In fact, Congress has done that on a number of occasions, specifically with respect to motorcycle helmet requirements which the National Highway Traffic Safety Administration had sought to impose on the States and which Congress has specifically prohibited the agency from putting into effect. See section 208(A) of Public Law 94-290. The question before this committee is an entirely different one: Should Congress seek to oversee virtually every agency rule and forbid every agency from putting those rules into effect until Congress has had an opportunity to review them first?

The principal focus of our testimony today will not be on the constitutionality of these proposals, but on their wisdom. In our view the proponents of the legislative veto have failed to give proper consideration to the practical problems involved in these proposals. In order to help the committee appreciate these difficulties, we have tried to hypothesize a situation in which a mythical agency has decided to issue a rule and wants to put it into effect, and then to attempt to dramatize for the committee some of the problems that the agency will encounter.

For purposes of our presentation, we will assume that the version of the legislative veto contained in H.R. 1776 is the one that has been adopted so that there is a specific framework for us to work with. In this dramatization, Ms. Brickey will assume the role of agency chairman and I will assume that of the agency's general counsel. We wish the record to reflect that neither of us has any aspirations toward either of those positions in this mythical agency, or in any other agency that might be seen to bear a resemblance to it.

We have copies of our dramatization. We thought it would be more effective if we passed them out afterward.

Ms. **Brickey**. What a great day. The commission has finally reached unanimous agreement on a revised offshore leasing rule, and voted to issue it at once. I'm sure we'll hear from industry, environmental groups, and some of the States, but we have finally recognized, you can't please everyone.

Mr. **Morrison**. Yes. We've been working on this change for years, but it's worth it because the rule is really a good one.

Ms. **Brickey**. The public has been very critical of us for not having dealt with this problem years ago. Also there has been tremendous pressure on us from Members of Congress, demanding that we get the rule out.

Mr. **Morrison**. Even the industry leaders want us to get done with the matter.

Ms. **Brickey**. The Commission wants to get this into effect immediately. We must give everyone a specific effective date because the companies need sufficient lead time to plan where they are going to drill. How soon can we put the rule in force?

Mr. **Morrison**. I don't know.

Ms. **Brickey**. What do you mean, you don't know? You are our lawyer. What does the law say?

Mr. **Morrison**. That's the problem. It doesn't say.

Ms. **Brickey**. But it must say.

Mr. **Morrison**. Let me try to explain. You see, Congress has been very unhappy with some of the rules we have issued—not only our rules, but other agencies as well. Now they want to look them over before they become effective. So we have to wait 90 days for them to go into effect, to give Congress that opportunity.

Ms. **Brickey**. In every case?

Mr. **Morrison**. Well, except for a few internal matters, rules that don't make any difference, and genuine emergencies.

Ms. **Brickey**. Does this rule qualify as an emergency?

Mr. **Morrison**. Well, we've had an energy crisis since 1973, but we've let it go on so long, I don't think the situation could pass as an emergency.

Ms. **Brickey**. "OK, I guess if we have waited this long, another 90 days won't make that much of a difference. So, why don't we just put in a date 90 days from today?

Mr. **Morrison**. It is a little more complicated than that. You see, the statute says 90 days continuous session, and that doesn't mean 90 calendar days. For instance, if either House is in adjournment for more than 3 days at a time, then those days off don't count.

Ms. **Brickey**. You mean every time one House goes home on Thursday afternoon and doesn't come back until Monday morning, we have an interruption?

Mr. **Morrison**. That's right. But it's even more complicated.

Ms. **Brickey**. Well, what else?

Mr. **Morrison**. Well, there are vacations and, of course, this year with the two conventions and the election, there is no telling whether the Congress will ever get the 90 days completed.

Ms. **Brickey**. Well, we can surely get it in force by early next year—can't we?

Mr. **Morrison**. I forgot to tell you about something else.

Ms. **Brickey**. What's that?

Mr. **Morrison**. Well, if we don't make it by the end of this Congress, we have to start all over again next year since the continuous session rule is halted when Congress adjourns sine die. But there is a possibility that this could take less than the 90 days.

Ms. **Brickey**. Explain that to me.

Mr. **Morrison**. If neither House of Congress has adopted a resolution of disapproval and no committee has reported such a resolution or been discharged from further consideration within 60 days, then the rule can go into effect immediately.

Ms. **Brickey**. It is rather confusing, isn't it? Well, what's Congress going to do with these rules when we send them over?

Mr. **Morrison**. They're going to review them on the merits.

Ms. **Brickey**. But we have done that here. We had all kinds of public proceedings.

Mr. **Morrison**. But they're going to do it again.

Ms. **Brickey**. You mean that industry, the environmental groups, the States, and all the Federal agencies are going to get a second bite at the apple?

Mr. **Morrison**. It's worse than that. Even those who didn't show up here at all can save their guns for Congress.

Ms. **Brickey**. Well, what standards are there by which the Congress might overrule us?

Mr. **Morrison**. There aren't any. They can do it for any reason—political, legal, constitutional, or simply because they don't like our agency.

Ms. **Brickey**. Suppose we do repromulgate the rule after they reject it and we respond to their difficulties. Have we finally completed the process?

Mr. **Morrison**. No way. The whole congressional review process starts all over, but review is limited to changes in the rule whatever that means. But the timetable is still the same.

Ms. **Brickey**. Well, what are the courts going to say about this action by Congress? Can the courts find that Congress has not acted in accordance with the statute itself?

Mr. **Morrison**. As far as I can see, the veto is absolute.

Ms. **Brickey**. You mean they have to get ⅔ in both Houses?

Mr. **Morrison**. No, no, you don't understand. In effect, only one House has to disapprove it, provided that it acts within 60 days and the other one doesn't affirmatively approve the rule within 90 days.

Ms. **Brickey**. Run that one by me again.

Mr. **Morrison**. Well, the usual time is 90 days for either House to disapprove it. But if one House disapproves it in 60 days, then the other House has to approve it by the end of 90 days or the rule is disapproved.

Ms. **Brickey**. You mean then sometimes it can go into effect in 60 days—but we won't be able to tell, so we ought to just figure 90 days?

Mr. **Morrison**. That's right.

Ms. **Brickey**. What about a veto by the President?

Mr. **Morrison**. They seem to have left him out of this operation entirely.

Ms. **Brickey**. Well, can Congress pick and choose part of the rule—disapprove some of it and let the rest stay?

Mr. **Morrison**. Not as I understand this statute, although some of the other proposals would have allowed it. But I'm certain that the Congress could, if it wanted, let us know what aspects of the rule bother it.

Ms. **Brickey**. How will they know what part we need, and whether we would have passed the rule at all absent the part that Congress doesn't like?

Mr. **Morrison**. They can always ask us. And in fact, we are probably going to have to go up to defend the rule.

Ms. **Brickey**. You mean that we are going to have to send all our experts up to the Hill to explain to Congress and their staffs—in both Houses—why we did what we did?

Mr. **Morrison**. I'm afraid so. Probably the Commissioners will also be asked to testify.

Ms. **Brickey**. How can they possibly do this with every rule? Don't they understand that there are 60,000 pages of rules in the Federal Register every year—not to mention the hundreds of pages of backup materials for each rule—and that there are 10 feet of the Code of Federal Regulations?

Isn't Congress already so overworked that it can't get everything done on its agenda? Why do they want to do this?

Mr. **Morrison**. I really don't have any idea.

Ms. **Brickey**. Say, what about those statutes that Congress is writing telling us we have to promulgate certain rules within fixed deadlines? Is this one of those cases?

Mr. **Morrison**. No, this isn't.

Ms. **Brickey**. Well, just what are we supposed to do in those cases?

Mr. **Morrison**. If you send the rule to Congress in the time prescribed, you are OK.

Ms. **Brickey**. Sort of makes a mockery of those firm fixed statutory deadlines, doesn't it?

Mr. **Morrison**. I won't dispute that one with you.

Ms. **Brickey**. Tell me about review of these rules by the courts. How does that fit in?

Mr. **Morrison**. Well, in the first place, it really gives everyone a third bite of the apple.

Ms. **Brickey**. I understand that. But what I want to know is, when are the court proceedings to take place?

Mr. **Morrison**. I was kind of wondering about that myself. The law is not at all clear. Our statute says if you don't like the final rule we have issued, you must petition the court for review within 60 days. Once that is done, the cases tend to move right along, since the judges don't like all this criticism about backlogs.

Ms. Brickey. So anyone who doesn't like our rule for any reason can appeal it in court, at the same time as they stir up opposition in Congress. Are we going to have to spend a lot of time writing court briefs while Congress is reviewing the matter?

Mr. Morrison. Seems sort of silly, doesn't it? On the other hand, it seems sort of silly to wait until Congress gets finished, and then add court delay on top of that.

Ms. Brickey. Well, you know, almost every time we put a rule into effect, somebody is asking us or the court for a stay. Isn't it going to be pretty hard to object to another delay after all of these delays?

Mr. Morrison. That's not the part of my job I think I'm going to relish. It certainly undercuts all of our efforts to eliminate regulatory delay, which has been such a source of criticism.

Ms. Brickey. Now, getting back to the problem I began with originally. What are we supposed to put in the Federal Register about the effective date of this rule?

Mr. Morrison. I really don't know. Maybe we should just refer to the Regulatory Reform Act of 1982, which established this whole procedural quagmire, and say that the effective date will be announced later.

Ms. Brickey. Well, I am just wondering whether the establishment of an effective date at a later time would itself be subject to the congressional review process.

Mr. Morrison. It may very well be.

Ms. Brickey. OK. One more question and I'll let you go back to work. Why are we bothering to issue any rules at all!?

Mr. Morrison. Maybe that's the whole point of the statute.

Thank you.

We have two other brief points that we would like to make. First, we at Public Citizen believe the legislative veto, in its one-House, two-House and 1½-House versions, is unconstitutional. I am principal counsel for Jagdish Rai Chadha, the individual who brought the suit in which the U.S. Court of Appeals for the 9th Circuit ruled last December that the veto at issue there was unconstitutional as a violation of the doctrine of separation of powers. See 634 F. 2d 408. Just this Monday the Supreme Court agreed to review that ruling. I am also counsel in another case in the U.S. Court of Appeals for the District of Columbia, *Consumer Energy Council of America* v. *FERC*, Nos. 80-2184 and 80-2312, which was argued on September 10, 1981. For the record I am submitting copies of our briefs in that case which set forth the reasons we believe the veto is unconstitutional. [See p. 79.]

Second, while I remain hopeful that our dramatization today and our constitutional arguments may persuade both houses of Congress to abandon the veto as both unwise and unconstitutional, I recognize that our likelihood of success is less than overwhelming. Therefore, let me offer a suggestion that I believe to be in the best long term interest of everyone, including the Congress.

In the two cases in which I am presently involved, as well as in every other veto case of which I am aware, Congress has made every possible effort to avoid having a court rule on the constitutional questions. Every procedural defense imaginable—ranging from standing, to ripeness, to political question, to lack of severability, to alleged jurisdictional defects—they have all been summoned forth as a front line defense to stop a ruling on the constitutional question.

We who believe that all vetoes which fall short of full legislation are prohibited by our Constitution are ready to have the Supreme Court decide who is right. Members of Congress take an oath to abide by the Constitution, which includes the obligation to pass only those laws that are constitutional. It is high time that Congress stopped asserting that the veto is perfectly valid, yet every time there is a court test, it uses every procedural device to prevent the courts from reaching the merits. As we used to say when we were kids, "put up your dukes and fight" but this time let's do it in the courtroom.

Thank you very much.

Mr. MOAKLEY. Since you are counsel in the *Chadha* case, do you think that the Supreme Court will address the constitutionality of the legislative veto?

Mr. MORRISON. Well, there are four or five defenses that the Senate and House counsel have erected as barriers they are asking the court not to decide it.

The 9th Circuit did decide it, overruled all those procedural objections. I am hopeful that the Supreme Court will decide this case before it.

In my view, the arguments accepted by the Court of Appeals in the 9th Circuit would apply analytically to all of the legislative vetoes and we may have a definitive ruling.

I know that there are a number of Members of the House of Representatives in particular who disagree with that, finding differences between one- and two-House vetoes, between the independent regulatory commissions, and the executive branch agencies, between adjudications, involved in the *Chadha* case and rulemaking.

I find no difference on a constitutional basis in any of these matters. But we will have to wait until probably June before the Supreme Court gives us an answer.

Mr. RHODES. Do you find any merit in the point that I tried to make with the previous witness that the ground upon which a veto is exercised might be important as far as the constitutionality is concerned?

Mr. MORRISON. I do not, Mr. Rhodes. Let me tell you why. I think from a separation of powers point of view, if what the Congress is doing is saying, "we think you exercised your discretion improperly," that is plainly executive action. If what it is doing, which is what it did in the *FERC* case, which is to say, "we changed our minds," that is plainly legislative. If you did what you are doing, which is saying the agency didn't follow the intent, that seems to be judicial.

It is just as much a violation of separation of powers for the Congress to interfere with the judiciary's function as it is for Congress to interfere with the executive branch's function. It goes in a different direction, but the violation is the same in my view.

Mr. RHODES. You are aware of the fact nowhere in the Constitution does it give the courts the right to interpret laws. They only do it because they must——

Mr. MORRISON. I would agree with you there is nothing explicit in the Constitution that says the courts have the authority to decide questions of constitutionality, but they do have the authority to decide cases or controversies presented to them.

Unless we are prepared to reopen *Marbury* v. *Madison,* it seems to me that the issue of whether the courts can decide constitutional questions is foreclosed.

You did make one suggestion that I did want to comment on the constitutional aspect.

You asked whether it would be constitutional for Congress to require a delay period of let us say 60 or 180 days. The answer to that question is, if it is in the statute, it is plainly constitutional. The Supreme Court decided that in the case of *Sibbach* v. *Wilson* in which the Federal rules of civil procedure, which have a delay mechanism, were at issue.

I would think as a matter of policy you ought not want to do that because it doesn't give the administrative agencies flexibility. That is a different question from the constitutional question. There are constitutional difficulties if you allow even a delay where the delay occurs as a result of a resolution rather than of a specific statute which makes it automatic in all cases.

Mr. RHODES. May I comment briefly? You brought up separation of powers in reference to this question.

I wonder if the separation of powers applies in lieu of an express constitutional mandate?

Of course, as we agree, there is no constitutional mandate for the court to interpret the law.

Mr. MORRISON. I would say separation of powers arises in two ways. One is encroachment by one branch upon powers of the other.

Mr. RHODES. But you have to define the powers.

Mr. MORRISON. Yes. For these purposes, I am not sure I agree with your——

Mr. RHODES. I am not sure I do either.

Mr. MORRISON. But, regardless of that, the general principles of separation of powers would also be violated when a branch of Government performs a function which it is not assigned under the Constitution.

That is, it would be just as much a violation of separation of powers for the executive branch to interpret the laws in cases or controversies, as it would be for the Congress to do that, and it is simply because under our system that is not one of the functions to which the Executive or Congress has been assigned in the Constitution. The Congress has been assigned the law-making function and with limited exception no other functions.

Mr. RHODES. What I think you are saying then is in your opinion the legislative function ends when the President signs the bill?

Mr. MORRISON. No; I didn't mean to say that.

I recognize and I applaud the Congress for recognizing its oversight responsibilities and there is a proper way to conduct oversight; it is conducted that way, and that is a way which gathers investigative materials and leads to a new law, or to a change in the law. But any time the Congress takes action which purports to bind others in a way short of the full legislative process, then that is not permitted by the Constitution.

Mr. RHODES. OK.

Mr. MOAKLEY. Gene?

Mr. TAYLOR. It would be your view that any regulation that the Congress disagreed with should be overturned by a measure that would go through the full legislative process, be passed by both Houses, and sent to the President? Nothing short of that would be acceptable, in your opinion, under the Constitution?

Mr. MORRISON. Insofar as it is mandatory. Now, I recognize that when a legislative committee and/or appropriations committee, in this House or the other body, issue a resolution which says, "We think you ought to re-think that rule," that any agency which doesn't at least take a look at it is courting legislative, if not budgetary disaster.

But that is different from a provision which gives the agency no choice and says to them, "You may not put that rule into effect." Whether it is wise to disagree with the Congress or not is a different matter, but as far as the power to purport to stop a rule—incidentally, these rules are not simply rules that affect the bureaucracy; they are issued principally because they help or hurt some segment of our society that violates the Constitution.

The people have a right to know what the rules are, to have their administrative process not be in vain, and not to come up and find a rule vetoed without the kind of careful consideration that the Congress simply doesn't have the time to give it.

Mr. **Taylor**. Do you think that the Federal Register is an adequate vehicle for informing the American people on these rules that become effective?

Mr. **Morrison**. I do not. We have long urged agencies to make additional efforts to send specific notices to interested groups, be they consumer groups, industry groups, or small businesses.

We think that much better effort needs to be undertaken in that regard. Interested Members of Congress ought to be advised about the rules in the rulemaking process and given an opportunity to express their views like other Members of the Congress, and I am sure they would be listened to with greater emphasis than other members of the public.

But it seems to me once the process is concluded that the legislative veto is the wrong solution to whatever problems the administrative processes may have.

Mr. **Taylor**. Thank you.

Mr. **Moakley**. Mr. Morrison, I think you both did a very good job of pointing out how a generic legislative veto could cause havoc in our Federal agencies.

Do you have any ideas or suggestions for eliminating the duplication, overlap, conflicts that arise when a regulatory agency drafts regulations that impinge on other agencies without conferring with the other agencies?

Mr. **Morrison**. Two separate problems. One is the conferring-with-one-another problem; that can be accomplished. I think it has been close to a greater extent in both this administration and the last administration by telling other agencies, as well as members of the public, what you are doing, so that opportunities for comment come in.

It is now I think fair to say in the regulatory processes that routinely the Department of Justice, Department of Transportation, EPA, OMB and others comment upon activities going on within the executive branch and in the independent regulatory agencies.

So insofar as knowledge of the proceeding and opportunity to comment, I think we have made progress.

Insofar as the problem is that EPA is told, "cut down on emissions from automobiles" and DOT is told that, "you have to increase gasoline mileage," and there is—and I don't believe this to be the case, but it has been argued by some to be an irreconcilable conflict—the fault, it seems to me, lies not with the agencies who are, after all, doing only what their mandate tells them to do, the fault is in the statutes themselves.

We need to think about what we are doing a little more; recognize that there may be tradeoffs but do it openly through the legislative processes and not through the legislative veto processes. That just sweeps the problem under the rug. It says, we didn't like what you did here, you go back and fix it up; it doesn't give the agency any guidance. I don't think that is responsible action. I think we are not going to make any progress with achieving the goals that I think the Congress has set and wisely set in many of the areas in which legislative veto has become most popular, to recognize that if there are difficulties we have to work them out in the open and not by simply vetoing things that we don't like without really knowing the difficulties involved in coming up with any rule given the balance of many considerations that have to be taken into account.

Mr. **Moakley**. Well, would you agree that oversight and judicial review sometimes come too late, usually after the damage has been done by the regulatory agency? What do you recommend as an intermediate step that Congress could take when it anticipates a problem if, in fact, the legislative veto is too severe?

Mr. **Morrison**. We have long advocated insuring methods by which all persons concerned with the rule know about it in advance and have an opportunity to participate.

Congressman Taylor was speaking a moment ago about the problem with the post office box. The problem, as I perceive it, is likely to have been caused by the fact that even if the individuals living in rural areas knew about it, they had no effective means to come in and participate.

We have for a long time advocated both the Consumer Protection Agency, with respect to consumers, and intervenor funding for consumers and small business groups that are unable to afford to participate and make their views known.

That is what we need; we need more democracy, greater opportunities for people to be heard. The reason that bad rules are issued, in my opinion, is not because we have bad people, silly people, or obtuse people working in the agencies; it is because they don't get a full factual record; the public not heard. Unless they are heard from, they don't get an opportunity to weigh the competing considerations and they do silly things. I think public participation is a very important means of doing that.

I also would say that the agencies are, it seems to me, doing a better job. They are thinking about rules more carefully. Judicial review may be too late in some sense, but it is not too late as long as it goes into effect before the rule takes place on the community.

So, other than that, the Constitution is not designed, as Mr. Olson pointed out, to promote efficiency; it is designed to prevent undue accretions of power and to see that when Congress takes action it takes it on a carefully considered basis.

The time you have spent today on this very important matter, you could never afford to have spent on our mythical offshore oil leasing rule. Indeed, the proposal here is a model of simplicity compared to the typical proposals that have to be issued for rules because of the fact that we live in a complex society where industry, environmental groups all have pushes and pulls that they need to have taken into account and therefore the notion of simplicity doesn't fit with the notion of equity. That is why we have complexity. I see no way out of that, given our complex society.

Mr. MOAKLEY. Tell me, have you put your roadshow on for Mr. Levitas?

Mr. MORRISON. We put on something similar to this 5 years ago. He got a copy of it. I seem to recall that he wanted to do something else afterward before some other group. I don't think he liked it too much.

Mr. RHODES. He probably wanted a part in it.

Mr. MORRISON. Yes; we would have had him on the committee to review all these rules.

Incidentally, there was a suggestion made earlier about looking at the States. I think Congressman Hall——

Mr. MOAKLEY. Actually we have looked at State review systems.

Mr. MORRISON. The State of California has a special legislative review committee and there is a report put out by Prof. Monroe Price from UCLA Law School which I received as a member of the Administrative Conference, I am sure they could provide you with a copy of that report, which indicates that while the objective is to keep the rules review process confined, the opportunity for arbitrariness and low-level inexperienced staff people basically, with their first job out of law school, saying up, down, or maybe, on some rules, seems to me to be precisely the kind of situation our democracy ought not to tolerate. But there is a report which does examine what happened in the State of California.

Mr. MOAKLEY. Mr. Beilenson, any questions?

Mr. BEILENSON. No questions.

Mr. MOAKLEY. Thank you very much. Your presentation really highlighted some of the problems that we have been concerned about in a very direct and graphic way.

Thank you very much for your presentation.

Mr. RHODES. I think we should strike some sort of an object comparable to an Oscar or an Emmy and award it.

Mr. TAYLOR. This committee room is a stage.

Mr. MOAKLEY. Only if Elliott could present the trophy.

Mr. MORRISON. Thank you very much.

[Copies of the two briefs referred to by Mr. Morrison follow:]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-2184, 80-2312

CONSUMER ENERGY COUNCIL OF AMERICA, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

PROCESS GAS CONSUMERS GROUP, et al.,
Intervenors.

On Petitions For Review Of Orders
Of The Federal Energy Regulatory Commission

BRIEF OF PETITIONERS

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January 12, 1981

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMER ENERGY COUNCIL)
OF AMERICA, et al.,)
)
Petitioners,)
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v.) Nos. 80-2184, 80-2312
)
FEDERAL ENERGY REGULATORY)
COMMISSION,)
)
Respondent,)
)
and)
)
PROCESS GAS CONSUMERS GROUP, et al.,)
)
Intervenors.)

CERTIFICATE REQUIRED BY RULE 8(c)

The undersigned, counsel of record for petitioners, certifies that the following are parties to this proceeding:

Consumer Energy Council of America (petitioner)
Consumer Federation of America (petitioner)
Public Citizen (petitioner)

Federal Energy Regulatory Commission (respondent)
Process Gas Consumers Group (intervenor supporting respondent)
American Iron and Steel Institute (intervenor supporting respondent)
Georgia Industrial Gas Group (intervenor supporting respondent)
Interstate Natural Gas Association of America (intervenor supporting respondent)
United Distribution Companies (intervenor supporting respondent)
American Gas Association (intervenor supporting respondent)

The 522 organizations and individuals who filed comments with FERC on the Phase II incremental pricing proposal are listed at pages 70-83 of the Veto Report which is Volume B of the Appendix filed in this Court.

These representations are made in order that the Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

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January 12, 1981

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---

* Authorities principally relied upon

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Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953)	43
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* Authorities principally relied upon

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMER ENERGY COUNCIL OF AMERICA,)
et al.,)
Petitioners,)
v.) Nos. 80-2184, 80-2312
FEDERAL ENERGY REGULATORY COMMISSION,)
Respondent,)
and)
PROCESS GAS CONSUMERS GROUP,)
et al.,)
Intervenors.)

BRIEF OF PETITIONERS

Introduction

The Natural Gas Policy Act of 1978 was a compromise between those who wanted immediate deregulation of the price of natural gas and those who wanted to retain and strengthen price controls. An essential ingredient in the compromise was the requirement that during the phase-out period for price controls, a portion of the price increase would be shifted from residential users to industrial users, a practice known as incremental pricing. The respondent Federal Energy Regulatory Commission ("FERC" or "the Commission") was required to issue rules implementing this compromise, and the second phase of these mandatory rules was made subject to a veto by either House of Congress. On May 20, 1980, the House of Representatives exercised its statutory power and vetoed the Commission's Phase II incremental pricing rule.

This petition for review challenges the constitutionality of that veto on the grounds that it violates the principle of separation of powers, that it deprives the President of his veto power under the Presentment Clause, that it contravenes principles of bicameralism, and that it constitutes an undue delegation of legislative authority.

QUESTION PRESENTED

Is it constitutional for one House of Congress to veto a rule issued by an agency of the executive branch of the federal government?*/

RELEVANT STATUTES

The relevant statutes are set forth in a separate Appendix at the end of this Brief.

REFERENCES TO PARTIES AND RULINGS

On May 6, 1980, the Commission issued the incremental pricing rule which is the subject of this petition for review. 45 F.R. 31622 (May 13, 1980); Volume B of Appendix at 17-89. On May 20, 1980, the House of Representatives voted 369-34 to disapprove that rule. 126 Cong. Rec. H 3855 (daily ed.). On August 1, 1980, the Commission denied the timely petition for rehearing filed by petitioners Consumer Energy Council of America, Consumer Federation of America, and Public Citizen, and also revoked the May 6 rule. Volume A of Appendix ("App.") at 7-15. On October 2, 1980, the Commission denied a second timely petition for rehearing relating to the August 1 order. App. 21-23. Neither of the denials of rehearing are officially reported.

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*/This case has not previously been before this Court. Counsel are unaware of any other related case presently pending before, or that may be presented to, this or any other Court.

The Committee on Interstate and Foreign Commerce of the House of Representatives, which recommended disapproval of the Commission rule, issued Report No. 96-938, 96th Cong., 2d Sess. (May 12, 1980), which sets forth the full text of the rule and the accompanying statement of reasons at pp. 17-89 (hereinafter the "Veto Report"). Because this brief will make references to the Veto Report and to the Commission's May 6 incremental pricing rule which is reproduced therein, the full Veto Report is being submitted as Volume B of the Appendix.

Without objection from petitioners, the following parties were granted leave to intervene in support of respondent: the Process Gas Consumers Group, the American Iron and Steel Institute, the Georgia Industrial Gas Group, the Interstate Natural Gas Association of America, United Distribution Companies, and the American Gas Association.

STATEMENT OF THE CASE

A. Statutory Background.

In April 1977, President Jimmy Carter sent to Congress a comprehensive energy program, one part of which was designed to increase the supply of natural gas. For many years the price of natural gas sold in the interstate market had been controlled by the respondent's predecessor, the Federal Power Commission (the "FPC"). Although there recently had been a dramatic increase in the price of interstate natural gas, it was still below the price in the intrastate market, which was not subject to federal controls. The existence of dual markets caused an imbalance of natural gas supplies in favor of the intrastate market. Furthermore, price controls were believed by many to be primarily responsible for the reduced supply of natural gas, since the price of natural gas, in terms of its BTU equivalent, was well below the price of oil. Because of the 1973 Arab oil embargo and subsequent events, there was increasing pressure to deregulate the price of interstate natural gas so that supplies would become more plentiful. Nonetheless, everyone recognized that the price increase resulting from deregulation would be inflationary and that it would hurt consumers, especially the poor, who depended on natural gas for such essential uses as home heating.

The House of Representatives acted first to address the natural gas problem. A special ad hoc energy committee held four days of hearings in eight sessions, see H.R. Rep. No. 95-496, Part 4, 95th Cong., 1st Sess. 95 (1977), and it eventually reported H.R. 6831. The bill contained six parts, part D of which dealt with natural gas. The natural gas provisions are summarized at pp. 10-11 and detailed at pp. 85-122 of the committee's report.

The committee proposed to retain price controls on a permanent basis and to extend the system to intrastate sales, thus ending the dual market problem, but to increase the price considerably above the then current price for interstate gas. Id. at 96.

The other major element of the program was directed principally at home owners who had been burdened by substantial recent price increases: the committee decided that they should be "temporarily insulated from further substantial price increases through incremental pricing provisions." Id. at 97. To accomplish this, price increases would be "disproportionately loaded onto low-priority users until the delivered price of natural gas to these users reaches equivalency with the cost of substitute fuels." Id.

The position of the committee was arrived at only after considerable debate and controversy. During the subcommittee mark-up, a deregulation proposal was adopted, but the full committee later overturned it. The committee reaffirmed that decision on the final day of mark-up by voting 23-20 to reject deregulation, which it saw as "a policy which posed the very real prospect of dramatically increased consumer costs for little or no additional supplies of natural gas . . . ." Id. at 95. It was for these reasons that the committee included section 410, the incremental pricing provision that required the FPC to protect high-priority users, particularly homeowners. Id. at 106-107. That determination was supported by an economic analysis of incremental pricing which indicated that no loss in production would result from maintaining lower consumer costs. Id. at 120. [1]

On August 1, 1977, the House of Representatives began five days of consideration of H.R. 8444, which was identical to H.R. 8631.

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[1] Some of the deregulation proposals sought to allay consumer fears by including incremental pricing provisions. Id. at 97-101.

See 123 Cong. Rec. 25897, col. 3 (August 1, 1977)(remarks of Representative Dingell). See also id. at 26168, 26169-70. There was no legislative veto in that incremental pricing provision, although there was one in the energy excise tax provisions. Id. at 27216, col. 2-3 (August 5, 1977).

The principal debate on the floor, as in committee, was over the question of immediate decontrol. The proponents of decontrol argued that the committee's bill would not produce enough new gas because the price allowed would be below the current intrastate level. Id. at 25912 (remarks of Representative Brown). Of great importance is that fact that the principal alternative had its own incremental pricing provision in section 27. See 123 Cong. Rec. 25324 (July 27, 1977); id. at 26448-50 (text of proposed amendment, August 3, 1977); id. at 25914 (purpose to protect residential users). Indeed, as Representative Brown, the leading supporter of the deregulation alternative, stated on the floor of the House on August 3, 1977: "[o]ne of the most important aspects of our amendment it that residential gas consumer[sic] will receive maximum protection from any higher prices" through incremental pricing rules. Id. at 26452, col. 2. He then went on to describe his amendment as a "true compromise."

The deregulation substitute failed by a vote of 199-227. 123 Cong. Rec. 26482 (August 3, 1977). On August 5, a further attempt at another substitute was defeated by a vote of 147-273, id. at 27231, and the original committee version was approved later that day by a vote of 239-180. Id. at 27242.

Meanwhile, the Senate Energy Committee was unable to agree on a natural gas pricing bill and thus simply reported out the President's version without any recommendation so that the issue could reach the floor. 123 Cong. Rec. 29704, col. 2 (September 16, 1977). The bill was then embodied in a substitute which was introduced by Senator Jackson on September 16 and printed in the Congressional Record at pages 29705-09. The debate in the Senate was over the same basic issues -- the need to deregulate in order to obtain new supplies of natural gas versus the limited ability of consumers to pay substantially more to heat their homes. But in the Senate, deregulation proponents had greater strength and thus, after a lengthy debate replete with amendments and an eventual cloture vote (123 Cong. Rec. 30809-10, September 26, 1977), a substitute authored by Senators Pearson and Bentson, providing for deregulation of new natural gas subject to a limited authority in the Commission to impose price ceilings, was accepted by a vote of 50-46, id. at 32306 (October 4, 1977), and then was sent to conference to be considered along with H.R. 8444. Id. at 32308.

What is essential for this case is that even the Senate bill provided for incremental pricing in order to protect consumers and other high priority users by shifting some of the price increases to industrial users. Id. at 32308, § 29. While the final debate does not discuss incremental pricing, its central place in obtaining support for deregulation was clear from earlier discussions of similar proposals by the Energy Committee Chairman Senator Jackson (id. at 29704, col. 3), the amendment offered to the original deregulation substitute by Senator Bentson (id. at 30744), the substitute for the incremental pricing provision offered by Senator DeConcini (id. at 30748), and Senator Riegle's addition of schools and hospitals to the class of protected users (id. at 31176). It is also noteworthy that while most of these incremental pricing provisions had required the Commission to transmit its rules to Congress 60 days before they became effective, none, including the final bill, had a legislative veto. See, e.g., § 11(f) of S. 2104 at 123 Cong. Rec. 29706 (September 16, 1977) and § 29 of H.R. 5289, id. at 32308 (October 4, 1977).

More than ten months later, the conferees reported a new natural gas bill, H.R. 5298, along with other provisions of a comprehensive energy package. S. Rep. No. 95-1126 (H.R. Conf. Rep. No. 95-1752), 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 8983. The natural gas bill covered 56 pages in the conference report, but only two pages were devoted to a general discussion of the history and basic provisions of the bill. The conferees asserted that the "conference agreement reconcile[d] these two very different bills" (id. at 68) by providing for a phased decontrol of natural gas pricing to be concluded by 1985, along with a mandatory, two-phase incremental pricing program, which represented a compromise between the incremental pricing provisions in the prior Senate and House bills. No mention was made in the summary of a provision not contained in either bill, but added by the conferees as section 202(c): a one-House veto for the second phase of the incremental pricing rules. The section-by-section analysis does note the existence of this provision, but does no more than simply describe it. Id. at 96-97. The report moreover makes it clear (by the use of the term "requires") that the Commission had no choice but to implement in two stages the incremental pricing provision set forth in the compromise. Id. at 96. While it was recognized that the Commission had flexibility in writing these rules, it had no choice but to implement incremental pricing in some form.

The Senate took up the Conference Report first, beginning on September 11 and continuing for nine days of debate. From the start, the proponents sold the natural gas bill as a compromise. Indeed, the term "compromise" was used not just once, but a hundred times. It was used in response to attacks from producers, who contended that the bill would not bring forth sufficient additional supplies, and to objections by consumers who were concerned that the deregulation provisions would add enormous new costs, particularly for homeowners. The sponsors argued that phased deregulation would lead to the production of more natural gas and that consumers would be protected from sudden increases by the incremental pricing provisions. While there were differences of opinion as to the effect of both provisions, there was no doubt among either the proponents or the opponents that the purpose of incremental pricing was to protect consumers. Equally important is the fact that throughout this discussion there was only one mention of the veto provision, and that was simply an acknowledgement of its existence. 124 Cong. Rec. S 15221-22 (September 15, 1978, daily ed.)(remarks of Senators Jackson and Percy). No one stated or even suggested that the veto provision was a key element of the compromise.

The principal effort of the proponents of decontrol was to recommit the report to the conferees, with instructions to remove all the pricing provisions, in essence leaving for another day the problem of what to do about price controls for natural gas. The issue came to a vote on September 19, and the motion to recommit was defeated, 39-59. Id. at S 15421. The bill then came up for a final vote on September 27 and passed 57-42. Id. at S 16265.

In the House, the support for the bill was even more tenuous; the sponsors virtually admitted that H.R. 5289 would be defeated if it were considered separately. Therefore, they proposed that all five parts of the energy package be considered in a single vote. See H. Res. 1434, October 13, 1978. H 12810. Again, opposition came from both producers and consumers for basically the same reasons that had been urged in the Senate. After considerable debate, a motion to consider the bills jointly, without amendments, was passed by a vote of 207-206 (H 12819, daily ed., October 13, 1978). The following day, by a vote of 231-168, the total energy package, including the natural gas compromise, was approved (H 13426-27, daily ed., October 14, 1978). On November 9, 1978, President Carter signed into law the Natural Gas Policy Act of 1978, Public Law 95-621, 92 Stat. 3351, together with the other parts of the energy package approved by Congress.

B. Proceedings Regarding the Incremental Pricing Rules.

1. Proceedings Before the Commission.

Section 201 of the Natural Gas Policy Act provided for Phase I incremental pricing regulations to apply to industrial boilers. 15 U.S.C. § 3341 (Supp. 1978). The Commission approved those regulations on September 28, 1979 (44 F.R. 57726, October 5, 1979), and they became effective January 1, 1980. Under them, only large industrial facilities that use natural gas as boiler fuel were subject to incremental pricing.

Section 202, 15 U.S.C. § 3342, required that the Commission promulgate a second rule by May 9, 1980, to include other industrial users not specifically exempted by other provisions of the Act. On November 15, 1979, the Commission issued a notice of proposed rulemaking providing for a broad Phase II incremental pricing rule. Docket No. RM 80-10; 44 F.R. 67170 (November 23, 1979). The proposal attracted wide interest. Public hearings were held in January 1980 in San Francisco, Salt Lake City, Chicago, Louisville and Washington, D.C. Some 522 comments were received from a variety of interested persons, including industrial users, natural gas suppliers and pipeline owners, and consumer groups. The comments were directed principally to the timing of a Phase II rule, the scope of the rule, alternative price ceilings, and the protections for residential and other high-priority users.

On May 6, 1980, three days before the May 9 deadline for issuing Phase II regulations, the Commission approved a proposal based upon its original November 1979 notice providing a broad

Phase II pricing rule. The order adopting the rule made it effective 91 days following the expiration of the 30-day congressional review period unless disapproved by either House. Veto Report 17. A number of those filing comments had urged FERC to defer Phase II regulations until greater knowledge and experience could be obtained. The Commission refused to do that because it concluded that the language in section 202, even read in conjunction with the right to amend in section 201(a), did not give the Commission that option. Veto Report 27. It concluded that it must act even in the face of acknowledged uncertainty "in order to carry out the Congressional intent that it be given a meaningful expansion of incremental pricing from boiler fuel to other industrial uses." Id. The Commission also rejected renewed efforts by producers and industrial users to undermine incremental pricing. In response to arguments that incremental pricing gave certain users an unfair advantage, the Commission found that the determination to create such a preferred class was made by Congress and that the Commission had no authority to reverse it. Id. at 51, 53.

2. Proceedings in the House of Representatives.

Although the Commission did not issue its rule until May 6, the House of Representatives Committee on Interstate and Foreign Commerce, through its subcommittee on Energy and Power, had already begun to look into the matter as a prelude to the receipt of the rule which was due no later than May 9. Thus on April 3 and again on May 6 the subcommittee had held hearings "on the Commission's final rule implementing phase II of incremental pricing." Veto Report 5 (emphasis added). Also on May 6, a resolution of disapproval was introduced in the House (H. Res. 655), and reported favorably by a voice vote of the subcommittee. Id. One day later the full committee considered the matter and reported it favorably, also by a voice vote. Id. Less than a week later on May 12, the full committee issued its report recommending disapproval of the Phase II incremental pricing rule.

The report leaves no doubt that the Commission was required to issue a Phase II incremental pricing rule when it did. Id. at 3. The Veto Report discussed both the operation of incremental pricing in general and its purposes in the legislative compromise, mentioning the desire to prevent interruption of supplies at the time of full deregulation and to protect residential gas users from the full effects of price increases. Id. at 3-5. In its analysis of the final rule, the committee recognized that both of the natural gas pricing bills debated by the House in 1977 included incremental pricing concepts as a "necessary prerequisite to increase wellhead prices for natural gas." Id. at 6. It then went on to consider what it perceived to be the issues presented to both the Commission and the House:

> The Commission's goal in developing a phase II incremental pricing rule was to minimize the economic harm to non-exempt industrial users yet develop a program that would yield meaningful benefits to exempt users. The task before the committee was to determine

> whether the risk of economic dislocation in requiring certain industrial customers at this time to shoulder increased gas costs is outweighed by the benefits in sheltering higher priority users from some cost increases and whether an expansion of incremental pricing at this time is consistent with current national priorities.

Id. at 7.

The committee discussed this issue in the next section of its report, which was titled "Changed Market Conditions and the Question of Timing." Id. at 8. It noted that energy market conditions had "changed drastically and in unanticipated ways" since the passage of the 1978 Act. The committee observed that, in light of these changes, the "motivation for expansion of incremental pricing at this time needs to be reassessed in light of these changed market circumstances." Id. Further on the committee stated that "the effects of phase I remain unresolved . . . .," observing that because of this, "there is little to go on in selecting an appropriate and productive plan for phase II." Id.

The committee then analyzed the Commission's determination of the appropriate alternative fuel price ceiling level, an important element in the mechanics of incremental pricing. It noted that the Commission believed that its mechanism was an unavoidable consequence of limitations imposed by Title II. Id. at 10. The committee disagreed, however, finding that the statute gave the Commission "broader discretion in defining a facility's 'alternative fuel cost' than has been embodied in the Commission's approach to phase II." It discussed the contending legal arguments and concluded that the Commission's view is not "the proper interpretation of the effect of section 204(e)," and that the Commission's "narrow interpretation . . . appears to be a misreading of the statute." Id. at 10, 11.

After further discussion of various aspects of the Commission's rule, the committee set forth its own findings:

> The committee finds that acknowledged uncertainty, current circumstances, and problems raised by the Commission's alternative fuel pricing mechanisms preclude the implementation of this rule.

Id. at 13. Among the factors noted were "[c]urrent market conditions," "unprecedented levels of inflation," and the possibility of "load loss resulting from fuel switching or reduced industrial activity" which "the committee is unwilling to accept." Id. at 14. With that very forceful and unanimous recommendation, the matter went to the floor of the House on May 20, 1980. See H 3839-3855 (daily ed.).

The discussion on the floor reflected many of the same concerns that the committee had raised regarding changed circumstances, although it did touch on other considerations as well. One of the early colloquies indicated that the veto proponents did not find fault with FERC for what it had done: " . . . I do not blame FERC . . . because we required them to do this." Remarks of Representative Volkmer, H 3841, col. 3. Representative Sharp then stated that "they basically did intend to carry out the intent of Congress, which was to have a mandated program on oil and fuel use, and to propose an expanded program to cover a lot of other industrial uses. So, we are using a legislative veto not as a way to discipline that agency, but as a way for us, as I think [was] intended by the conferees on the 1978 act, to have a second look at the policy that we could not be certain of that we were not willing to mandate at that time." Id., col. 3.

Another supporter of the veto was Representative Preyer, who indicated that the veto was entirely consistent with a a bill he had introduced in the 96th Congress, H.R. 5862, to repeal the incremental pricing provisions of the Natural Gas Policy Act. H 3843. In support of the veto, he contended that Congress was exercising its responsibilities and that the drafters were wise in deciding that "Congress should have another look at this exceedingly complex regulatory mechanism known as phase II incremental pricing . . . ." Id. He further suggested that "times did indeed change and, as a result, implementation of the phase II incremental pricing regulations is not in our Nation's best interests." Id. Like several of the previous speakers, he commended FERC for what he described as "their efforts to fashion the most reasonable possible implementation of an exceedingly complex law." Id.

The next speaker, Representative Lundine, stated that he had supported the 1978 Act "with the understanding that consumers would be shielded as much as practicable from increasing gas costs as natural gas prices were deregulated through implementation of an incremental pricing system . . . ." H 3844, col. 1. In his view, however, changed circumstances dictated rejection of that approach.

The focus of the debate then shifted as Representative Collins, who had opposed the 1978 Act, pointed out that incremental pricing would be detrimental in the long run because industry would shut down due to higher fuel costs or pass their cost increases to consumers. Id., col. 2. He then pointed out why he believed in 1978 and continued to believe in 1980 that incremental pricing was unwise as a matter of policy, and it was for this reason that he voted in favor of the veto. The next speaker was Representative Brown, whose 1977 substitute included incremental pricing provisions, but who nonetheless concluded that Phase II would satisfy none of the proposed objectives of the incremental pricing rules and that because the "energy world has changed dramatically" since 1978 and the assumptions at that time "have proved inaccurate," the rule should be disapproved. H 3845, col. 2.

Other veto supporters, however, argued that FERC had failed to carry out Congress' intentions regarding Phase II. Representative Markey, who favored stronger incremental pricing rules, contended that FERC had an obligation to come back to Congress "with a rule more in line with the prescriptions set forth in the Natural Gas Act" which would do a better job of protecting consumers from the "excessive increases allowed in title I." H 3847, col. 3. From the opposite perspective, Representative Ashley in a prepared statement agreed that the Commission had failed to carry out the intent of Congress in a manner that he, as one of the authors of the bill, perceived it. He stated that his review of the rule "leads me to the view that the thrust of the rule runs counter to the legislative history of the NGPA and to the intent of Congress. Moreover, I am convinced that the promulgation of the rule as currently constituted would be a serious mistake in public policy." H 3854. He also chastised the Commission for not exercising "caution and consideration" and urged a "more moderate approach to incremental pricing than that reflected in the phase II rule that has been submitted to Congress." Id.

Another strong supporter of the resolution of disapproval was Representative Stockman. He began his statement by indicating that "our purpose today is simply to lay to rest by the agency of legislative veto a dubious regulatory experiment that has been overtaken by the rush of events and unanticipated developments." H 3848. After briefly yielding the floor, Representative Stockman continued by noting that in the past 18 months there was a "vastly changed price and a vastly changed market for alternative petroleum fuels that could not simply have been anticipated at the time." H 3849. He further noted that "we are faced with an unanticipated dilemma" and that the "original assumptions have proved invalid, they were overtaken by events; . . . ." Id. He concluded with a request for support of the veto "to correct an error in policy that would otherwise go into effect regarding the natural gas market if we do not approve this resolution." Id.

Finally, one of the leading supporters of a broad use of the legislative veto , Representative Levitas, supported the resolution because of "changed circumstances and the fact that it would be counterproductive to the basic goal which was sought to be achieved by the natural gas legislation passed in 1978." Id. He then observed that the legislative veto is "a useful and utilitarian method for correcting either mistakes or excesses . . . by administrative agencies or to take account of situations which could not have been contemplated at the time that the original legislation was passed." Id. at 3849-50. A number of other members spoke in support of the veto, and thereafter a roll call vote was held, and the veto resolution passed 369-34. H 3855 (May 20, 1980, daily ed.)

3. Rehearing Proceedings Before the Commission.

On June 5, 1980, pursuant to 18 C.F.R. § 286.102, petitioners in this proceeding, Consumer Energy Council of America, Consumer Federation of America, and Public Citizen, petitioned for rehearing of that portion of respondent's May 6 order adopting incremental pricing rules which conditioned its effectiveness on the failure of either House to pass a resolution of disapproval within 30 days. App. 1-6. The petition made explicit reference to the veto provision language, described the petitioners (who represent consumers and other users adversely affected by the veto), and explained why they believed that the veto which had been exercised was unconstitutional. The Commission granted rehearing solely for the purpose of further consideration, and then on August 1, 1980, entered an order denying the petition. App. 7-15. The Commission recognized that the constitutionality of the veto was an issue on which there was considerable debate, but it declined to rule on it in light of the statutory mandate. Not content to leave the matter at that, and purporting to act to rid the public of some ill-defined uncertainty, the Commission revoked the rule which had already been vetoed.

In response, petitioners sought rehearing of that portion of the August 1 order which purported to revoke the May 6 rule. App. 16-20. Their September 2 petition argued that the revocation was invalid since the Commission had no discretion to revoke the rule. They also argued that even if FERC had the authority, it had failed to comply with the Administrative Procedure Act because it had not afforded interested persons an opportunity to comment, as required by 5 U.S.C. § 553, and that there had been no good cause alleged, let alone demonstrated, for such precipitate action. Because the judicial review provisions, 15 U.S.C. § 3416(a)(4), require that petitions for review be filed within 60 days of a denial of a petition for rehearing, petitioners sought review of respondent's August 1 order in this Court on September 26, 1980 (No. 80-2184). Thereafter, on October 2, 1980, the Commission denied petitioners' second rehearing petition, finding that it had the authority to revoke the rule and that notice and comment were unnecessary because there was notice before the original rule was issued. App. 21-23. Thereafter, on October 24, 1980, a second petition for review was filed in this Court (No. 80-2312), and the petitions were subsequently consolidated by this Court's sua sponte order of November 7, 1980.

SUMMARY OF ARGUMENT

On December 22, 1980, the United States Court of Appeals for the Ninth Circuit ruled that a legislative veto provision violated the separation of powers principle in the Constitution. Chadha v. Immigration & Naturalization Service, No. 77-1702, ____ F.2d ____ ("Chadha"). Although the opinion was careful not to go beyond the specific immigration statute before it (Slip. Op. at 39), the court's analysis demonstrates that the veto of the incremental pricing regulations here also violates the principle of separation of powers.

As the Chadha decision establishes, the doctrine precludes one branch of government, here the legislature, from overruling the actions of another, here the executive. The sole exception arises where there is a specific check or balance written into the Constitution, such as the role of the President in the legislative process or the Senate in appointments and treatymaking, and there is none here.

The principal purposes of separation of powers are to prevent the undue accretion of power in a single branch and to ensure that the branch to which the power is delegated retains control over it. The Chadha court recognized that it is necessary to examine the precise statutory scheme in order to determine the function of the veto in it. After this is completed, the Court must measure the role assumed by Congress in exercising the veto against the constitutional separation of powers. Within this analytical framework, it is plain that the veto here, like that in Chadha, is unconstitutional. Thus, if the House of Representatives were reviewing FERC's interpretation of a provision of the Natural Gas Policy Act and disagreed with the Commission, as the Commerce Committee and a number of members seemed to be doing, it was performing a judicial, not a legislative, function which it is not permitted to do. On the other hand, if the House was seeking to share the responsibility for, or control the implementation of, the incremental pricing statute, it was performing an enforcement role which is an executive, not legislative, function which is also impermissible.

The committee report and the floor debate demonstrate that the predominant reason for the veto was the perception that changed circumstances made it desirable to change policy regarding incremental pricing. However, that is a legislative function which requires the concurrence of both Houses and an opportunity for the President to sign the legislation or veto it. Since the only constitutionally-permitted method of enacting legislation was not utilized, the veto is extra-constitutional and unauthorized.

Moreover, there is no residual power in Congress to change policy, because to hold otherwise would deprive the President of his right under Art. I, § 7 to participate on all matters affecting the public. In addition, the "necessary and proper" clause is of no help since it authorizes only laws that do not violate other provisions of the Constitution, such as those requiring separation of powers. Furthermore, as the Chadha court correctly concluded, the power is only to "make all laws" and not to take any other action Congress "deems convenient." Slip Op. at 40.

Quite apart from separation of powers issues, the one-House veto transgresses the doctrine of bicameralism. The powers of Congress are confined to those enumerated in the Constitution, and the history of bicameralism demonstrates that, except for powers specifically assigned to one House in the Constitution itself (such as those in Art. II, § 2, cl. 2 relating to appointments and treaties), neither House has the power to act in a way that affects the public except with the concurrence of the other.

Finally, even if the action of the House does not violate any of these specific constitutional guarantees, it still must fall as an undue delegation. Since the veto power can be exercised without any standards and without judicial review, it would plainly be improper if granted to an administrative agency. Although the veto was exercised by elected representatives, they were not functioning in a legislative capacity and cannot claim the protection of legislative freedom since the necessary checks and balances to the unfettered discretion of the House of Representatives -- participation by the Senate and the President -- were lacking.

ARGUMENT

Introduction

The American constitutional system is one of affirmative grants of power: each of the three coordinate branches is limited to those powers assigned to it. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). In Article I, the Constitution explicitly provides that the laws shall be made by the Congress, comprised of the Senate and the House of Representatives, working in conjunction with the President. In Article II, the President is assigned all executive powers, including the mandate to "take Care that the Laws be faithfully executed." Art. II, § 3. In Article III, the judiciary is delegated the power to decide "cases" and "controversies" arising under the laws of the United States.

Congress unquestionably has the power to legislate to regulate the price charged for natural gas sold in interstate commerce. Art. I, § 8, cl. 3; Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). Just as clearly, it has the power to delegate to the Executive the authority to supplement and give effect to statutes passed by Congress. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). Indeed, the actual execution of such laws can be accomplished only by Executive officers. Art. II, § 1 and Art. II, § 3; Buckley v. Valeo, 424 U.S. 1, 140 (1976).

Congress has, most recently through the Natural Gas Policy Act of 1978, established a comprehensive plan for regulating the price of natural gas sold in interstate markets, and it has properly delegated the administration of that Act, including the incremental pricing provision, to the Commission. Certainly, Congress may withdraw its delegation or change the laws concerning incremental pricing or any other aspect of the Act at any time that both Houses pass a bill which is either signed by the President or enacted over his veto by a two-thirds majority of each House. Art. I, § 7. However, in the provision challenged here -- § 202(c), 15 U.S.C. § 3342(c) -- Congress has chosen a different method of attempting to alter the existing statute to control executive action, a veto by either House acting alone. Nowhere in the Constitution is there an express grant, or even an implicit recognition, of such a one-House congressional veto power. Indeed, the Constitution was almost a hundred and fifty years old before the Congress first enacted a statute containing such a provision. The question then is whether such a power may properly be exercised in light of other constitutional provisions, principally the doctrine of separation of powers.2/

2/ There are a large number of commentaries on this constitutional question. The most prominent are referred to by the court in Chadha in notes 10 and 36. A number of congressional hearings have also considered the topic and all but the most recent hearings are referred to in these commentaries. See also Studies on the Legislative Veto, 96th Cong., 2d Sess. (1980) (prepared by the Congressional Research Service for the Subcommittee on Rules of the House of the House Rules Committee); Sunset, Sunrise, and Related Measures, Hearings Before the Subcommittee on the Legislative Process of the House Rules Committee, 96th Cong., 1st Sess. (1979); Regulatory Reform and Congressional Review of Agency Rules, Hearings Before the Subcommittee on Rules of the (footnote continued)

I. THE CONGRESSIONAL VETO VIOLATES THE CONSTITUTIONALLY REQUIRED SEPARATION OF POWERS.

The fundamental thrust of petitioners' challenge is that the one-House congressional veto violates what James Madison called the most "sacred" principle of our Constitution (1 Annals of Cong. 604); namely, "that the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 120 (1976). It is a principle that the Ninth Circuit described in Chadha as "vital for constitutional government." Slip Op. at 20.

Thus, under our constitutional system, no one branch may legitimately perform the functions or control the performance of another branch unless there is an express constitutional exception -- a check and balance -- creating that interbranch blending of power. As the Supreme Court explained in Kilbourn v. Thompson, 103 U.S. 168, 191 (1881), "[i]t is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department

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(footnote continued:)
House Rules Committee, 96th Cong., 1st Sess. (1979)(3 volumes); Oversight of the Federal Trade Commission, Hearings Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979); Chadha, supra, note 16.

and no other." Only in this way can the "accretion of dangerous power" by a single branch be avoided. Youngstown Sneet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

A. The Constitutional History of the Principle Of Separation of Powers Demonstrates That One Branch Cannot Perform the Functions or Control the Performance of Another.[3]

Very early at the Constitutional Convention, the Framers agreed to separate the new government into three distinct branches "consisting of a supreme Legislative Executive & Judiciary."[4] Yet a review of the constitutional debates discloses no discussion of the desirability of this division, because the Framers and their critics alike accepted the fundamental, unchallengable principle that none of the three branches should be allowed to interfere with the functions assigned to the others. This can largely be attributed to the influence of Montesquieu's The Spirit of the Laws (1748), and the widespread acceptance of this principle in state constitutions. See J. Adams, A Defense of the Constitutions of Government of the United States (1787). The main thrust of Montesquieu's work was on the necessity of keeping the three branches of government distinct and separate.[5] He also argued that separation in itself was insufficient to preserve independence of the branches and that specific institutional checks were needed to balance the powers of one branch against those of the others:

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[3] The Chadha court explored the history and purpose of the doctrine of separation of powers at considerable length. Rather that repeating it here, petitioners have chosen to highlight those portions which seem most relevant to this case.

[4] M. Farrand, Records of the Federal Convention of 1787, vol. 1, p. 35 (1966) (hereinafter cited as "Farrand"). Other frequently cited works will include Elliot's Debates on the Federal Constitution, J. Elliot, ed., 5 vols. (1836) (hereinafter cited as "Elliot"); and J. Madison, A. Hamilton, J. Jay, The Federalist Papers (1961 ed.)(hereinafter cited as "Federalist").

> The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative . . .. Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

Montesquieu at 209.

Having agreed on the basic structure, the delegates debated what modifications were necessary to provide the appropriate checks and balances. By carefully specifying in the Constitution the exceptions to the general rule of separation of the branches, the Framers sought to check the excesses of each branch by balancing them with powers in the others. Their primary concern was that power not be created and controlled by the same hand.

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[5] When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Complete Works of Montesquieu, vol. I, 199 (London: 1977) (hereinafter "Montesquieu").

Thus, two days after agreement was reached on the tripartite form of government, James Madison defined the scope of the executive authority when he moved "that a national Executive ought to be instituted with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature." 1 Farrand 67. The Committee of the Whole then struck the words, " . . . and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature," on the sole ground that "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'" Id. As Madison stated in Federalist No. 48:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectively restrained from passing the limits assigned to it.

While stylistic modifications were later made in the remaining language, the Framers' intent remained that once a power was assigned to the executive, it became an executive function, and as such not subject to encroachment from any other branch.

Support for this proposition is presented in the examination of the separation of powers principle by members of the very first Congress. A bill had been introduced in the House to establish a Department of Foreign Affairs, and the question arose as to whether the Senate, which played a role in appointing officers, should also play a role in their removal. 1 Annals of Cong. 473 _et_ _seq._ On June 16-17, 1789, Madison and others emphasized the importance of preserving "responsibility" (accountability) in a single executive, arguing that allowing the Senate to share in the removal power would diminish the accountability of the executive, and that the distinct separation of the branches had been intended in part to bring about such accountability. _Id._ at 473, 518. Thus, Madison argued, Congress may share the role of putting an officer in a position to administer the law, but it cannot share the executive responsibility of ensuring a proper administration of the law. Madison's argument that the Constitution mandated this result carried the Congress, and the bill was passed by both Houses and signed into law by President Washington on July 27, 1789. 1 Stat. 28.

There is no doubt that the Framers wanted to prevent one branch from performing functions that were specifically assigned by the Constitution to the exclusive province of another branch in order to prevent, as the _Chadha_ court observed, a "dangerous concentration of power in one branch." Slip Op. at 22. But this history demonstrates that they had a second purpose in mind. The Framers recognized that some activities might be assigned by legislation to either of two branches, and they concluded that once that assignment was made, there should be no intermingling of performance, so that responsibility would be clear regardless of which branch was assigned the duty. Thus, under the first prong of separation of powers, there would be a violation if, for example, Congress attempted to enforce the incremental pricing standards or pass judgment on whether its own laws had been violated. Under the second branch of the separation of powers doctrine, a violation would occur if, for instance, Congress determined to assign a particular enforcement function to the Commission and then attempted to undertake that responsibility in partnership with it. See also Chadha, supra, at 22-25.

The court in Chadha, after reviewing the history of the doctrine of separation of powers and the statute involved in the veto, concluded that the veto exercised by the House of Representatives violated separation of powers. Accordingly, petitioners will now review the functions performed by the Commission in issuing the Phase II rule, and by the House in vetoing it, in order to demonstrate that the veto here also violates the doctrine of separation of powers.

B. The Functions Performed by the House of Representatives in Vetoing the Incremental Pricing Rules Constitute Unauthorized Executive or Judicial Actions.

The Commission was required by section 202 of the Natural Gas Policy Act of 1978 to issue Phase II incremental pricing regulations within 18 months of its effective date. The undisputed purpose of the requirement was to protect residential and other high-priority natural gas users, and the statute assigned users to either high or low priority status. Within the mandate, the Commission was given discretion in a number of important respects.

In order to carry out its responsibilities, the Commission issued a notice of proposed rulemaking, held hearings in cities around the country, received comments, developed an appropriate incremental pricing rule, and explained its rationale at considerable length. The rule was made explicitly subject to judicial review in which questions of law, issues of abuse of discretion, and (subject to the substantial evidence rule) the factual underpinnings of the Commission's rule, would be subject to scrutiny. 15 U.S.C. § 3416(a)(4).

However, section 202(c) superimposes, or more precisely, interposes prior to judicial review, its own form of scrutiny in which a rule can be rejected by one House of Congress for any reason which a court might reject it, plus any other reason, or no reason at all, since there are no standards in section 202(c). In this case, there are clear indications that a number of members believed that the Commission incorrectly interpreted the statutory standard. The committee report specifically disagrees with the Commission's interpretation (see pp. 14 -15, supra) as did a number of members who participated in the floor debate, although their disagreements with the Commission's interpretations were sometimes in diametrically opposite directions. See pp. 15-19, supra. Just as the court in Chadha concluded that the House of Representatives could not interpret the Immigration Act there, so the House of Representatives here cannot act as a court to determine whether the Commission properly construed the incremental pricing provisions of the Natural Gas Policy Act.[6/]

A second alternative is that the House here was attempting to share in the implementation of the law. However, as the Ninth Circuit found in Chadha, such sharing of the executive power of implementation is impermissible. Slip Op. at 37-39. In this instance,the committee did seem concerned that FERC had acted with so little information from Phase I and that it was unwise to proceed with so little data. Veto Report at 8. It also cited "problems raised by the Commission's alternative fuel pricing mechanisms" as one of the key factors supporting disapproval. Id at 13. On the floor, Representative Ashley suggested that he was voting for a disapproval in part because he believed that the Commission had not exercised sufficient caution and should have been more moderate in its approach. See pp.17-18, supra. Representative Levitas, one of the leading sponsors of legislative

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6/ Indeed, the "interpretation" is particularly offensive in this situation since the committee was purporting to judge the Commission rule as a result of hearings that were conducted before the final rule had been issued and in a resolution which was voted the same day that the Commission rule issued, supplemented by a report 6 days later. While the function of interpretation is surely judicial and as such cannot properly be performed by the Congress, the proceeding was far removed from any judicial proceeding and underscores the inadvisability, as well as unconstitutionality, of a legislative body acting as an ad hoc judicial forum meting out summary reversals of executive decisions with which it may disagree. See Chadha, Slip Op. at 38.

vetoes, conceived of the veto as performing a dual function in this case, one of which was to prevent rules he viewed as counter-productive and excessive under the circumstances from becoming effective. See p. 19, supra. These remarks suggest that their authors were substituting their views on implementation for those of the Commission.

While perhaps the executive function is the least prominent of the three roles asserted, it was certainly a factor for some of the veto's supporters and to that extent represents an unconstitutional legislative undertaking of an executive assignment. Thus, if the House vetoed the rule because it disagreed with the manner in which the Commission exercised its discretion, it was interfering with the execution and administration of the laws. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). Enforcement is a function that constitutionally may be exercised only by "Officers of the United States." Moreover, by performing an executive function, members of Congress are also violating the Constitution's incompatibility clause -- "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Art. I., § 6, cl 2; Buckley v. Valeo, supra, 424 U.S. at 124-41. In short, neither Congress nor one House of it can both make and implement the law, as was done here.

Analyzing the issue instead from the perspective of "control," or interbranch interference with the performance of another branch's responsibilities, leads to the same conclusion. The Constitution specifically provides that certain responsibilities should be shared, but that other responsibilities must be performed by one branch alone. Otherwise, if responsibilities are shared, separateness breaks down, and the independence of the branches will be destroyed.

Admittedly Congress has broad discretion in the manner in which it allocates responsibilities under a given law. Thus, it can pass legislation dealing with problems in the most minute detail, as it often does in the tax area. Indeed, Congress can reverse specific executive actions when it does so by statute, rather than resolution. Conversely, Congress can give broad discretion to a particular agency by delegating extensive authority under very generalized standards. But once the Congress has assigned a function by statute to the executive, it becomes an executive power which cannot be shared and cannot be subjected to unilateral congressional control. Here, the incremental pricing rulemaking authority was assigned by statute to FERC, and it must remain an executive function, beyond the control of Congress, until such time as the Congress withdraws the allocation through a new legislative act, passed by both Houses and signed by the President or passed over his veto.

This principle has long been accepted in the analogous area of appointments. Congress can establish executive positions, and can set standards for removals, but once an appointment has been made, the congressional role is finished, except for possible impeachment. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926). Congress cannot undo the appointment except by abolishing the office, a task which requires another duly enacted statute. Cf. United States v. Nixon, 418 U.S. 683, 696 (1974). Likewise, here Congress could have established incremental pricing rules by statute, but once it directed the Commission to do so, it cannot undo those rules other than through a validly enacted statute.

II. THE VETO IS UNCONSTITUTIONAL, EVEN IF VIEWED AS A LEGISLATIVE ACT.

A. The Veto Is Also Unconstitutional as the Unauthorized Performance of a Legislative Function.

Although it is impossible to know why each of the supporters of the veto voted for it, the committee report and the floor debate demonstrate that many of those who opposed the incremental pricing rule did so because they believed that, in light of changed circumstances, the rules were ill-advised as a matter of policy. As noted above, the committee report had a section entitled "Changed Market Conditions and the Question of Timing" in which it concluded that the situation had "changed drastically and in unanticipated ways," which the committee set forth in greater detail in subsequent sections of the report.

The debate on the floor was even clearer. Several of the members spoke to assure FERC that it was not being condemned for improper action, but simply that Congress wanted "to have a second look at the policy." See p. 16, supra. Another member indicated that "times did indeed change and, as a result, implementation of the phase II incremental pricing regulations is not in our Nation's best interests." Id. Others such as Representative Stockman stated that the situation had been "overtaken by the rush of events and unanticipated developments" and that the Commission is now faced with a "vastly changed price and a vastly changed market for alternative petroleum fuels . . ." See p.18, supra. Representative Levitas also spoke of "changed circumstances" and the need to "take account of situations which could not have been contemplated at the time that the original legislation was passed." See p. 19, supra.

There is, of course, nothing wrong with Congress changing its mind. A policy which may be appropriate at the time of enactment may need to be altered as the result of changed circumstances; members may also conclude that the original concept was wrong in the first place. But when Congress wants to change a decision, it must do so in the same way that it enacted its initial decision: by concurrence of two Houses and the President. See Points III and IV, infra. While it is clear that no such concurrence took place here, the effect of this veto -- to wipe out a mandatory incremental pricing rule that was the essential element of a legislative compromise -- was just the same as if one House had attempted to amend the statute. Indeed, one of the members who spoke in support of the veto began by praising the veto's sponsor, stating that he would "like to commend the gentleman also for this legislation . . .." 126 Cong. Rec. H 3841, col. 2 (daily ed. May 20, 1980)(remarks of Representative Volkmer, emphasis added). See also id. at H 3843, col. 3 ("Congress should have another look at this exceedingly complex regulatory mechanism")(remarks of Representative Preyer, emphasis added). Since the decision which effectively deleted the incremental pricing portion of the 1978 Act was made by an extra-constitutional one-House veto, it cannot stand.

B. The "Necessary and Proper" Clause Does Not Support the Veto.

In Chadha, the House and Senate submitted briefs as amici urging that the "necessary and proper" clause of the Constitution gave a single House the power to exercise a veto. That provision, which is contained in Article 1, § 8, cl. 18, vests in Congress the power to "make all Laws that shall be necessary and proper for carrying into Execution the foregoing Powers [enumerated in Section 8], and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." The notion that this provision can support the veto, however, was laid to rest by the Chadha court which observed that the power "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power." Slip Op.

at 40. Thus, while Congress has the power under the commerce clause to make laws controlling the price of natural gas sold in interstate commerce, that does not give one House the right to veto pricing rules issued by the Commission under a power specifically delegated to it.

The case law prior to Chadha makes it clear that the necessary and proper clause has built-in limitations. As Chief Justice Marshall said in McCulloch v. Maryland, 17 U.S. (4 Wheat.)316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. (Emphasis added).

The Supreme Court has on several occasions struck down legislation which, although arguably "necessary," was not "proper" because it violated express constitutional provisions. For example, in Reid v. Covert, 354 U.S. 1 (1957), two civilian women challenged their court-martial convictions for murdering their husbands, both military personnel stationed overseas, on the ground that the Uniform Code of Military Justice, which extended court-martial jurisdiction to civilians, improperly deprived them of their right to trial by jury. In response to the Government's contention that jurisdiction over spouses was "necessary and proper" to carry out obligations of the United States under international treaty agreements, the court replied that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 345 U.S. at 16.

More recently, in Buckley v. Valeo, 424 U.S. 1, 135 (1976), the Court struck down legislation establishing the Federal Election Commission as violative of the Appointments Clause, Art. II, § 2, cl. 2:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Even the Court of Claims, which on the basis of the "necessary and proper" clause upheld a Congressional veto in the context of a statute pertaining to judicial salaries, recognized that the clause could not override a specific constitutional provision or limitations imposed by the separation of powers. Atkins v. United States, 556 F.2d 1028, 1061 (1977), cert. denied, 434 U.S. 1009 (1978). Thus, the authorities make it clear that the "necessary and proper" clause adds nothing to the defense of the veto.

C. The Veto Cannot Be Justified Either as a Valid Condition on a Delegated Power or as A Practical Necessity in the Modern World.

Other legal and practical arguments advanced in support of the one-House veto are unpersuasive. It is sometimes argued that if Congress can delegate a power, it must also be able to retain a part of that power through the controlling mechanism of a veto over the exercise of the power. Specifically, it is argued that since Congress can delegate a power to the executive subject to the pre-condition of a favorable vote of affected persons, Currin v. Wallace, 306 U.S. 1 (1939), it should likewise be able to delegate power subject to the condition that there is no unfavorable vote of either House of Congress. In Currin, the Supreme Court upheld the authority of the Congress to delegate the power of inspection of tobacco to the Secretary of Agriculture, while at the same time conditioning the delegation upon a vote of farmers to accept inspection. However, the fact that Congress can sometimes attach a condition to a delegation of power does not mean that it can attach any condition it chooses. While Congress can condition agricultural inspections upon a vote of farmers to receive them, it could not, for example, condition agricultural inspections upon an agreement of farmers to relinquish their rights to vote in general elections. See Dunn v. Blumstein, 405 U.S. 330 (1972); Speiser v. Randall, 357 U.S. 513 (1958).

The imposition of the condition of a congressional veto on the issuance of incremental pricing rules is impermissible, since "whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1445-46 (1968). If, as we argue, specific constitutional limitations prevent Congress from directly decreeing that one House may veto incremental pricing rules without the concurrence of the other House and of the President, neither can it achieve that end indirectly by attaching it as a condition to FERC's rulemaking authority. Indeed, Madison warned in his essay on separation of powers that vigilance is especially necessary to uncover and prevent Congressional overstepping because Congress "can with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." Federalist No. 48.

The condition in cases such as Currin was itself constitutionally neutral since there is no prohibition against tobacco growers voting to decide whether to accept a particular marketing plan. On the other hand, the one-House veto here contravenes the specific constitutional requirements of a Presidential veto opportunity and passage by a bicameral legislature, as well as the prohibition against the interference by one branch with the affairs on another. "It is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore 'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise." Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569, 595 (1953). *See also Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alas. 1980); *Chadha*, *supra*, Slip Op. at 42 (power to do greater does not include lesser). Congress is not required to give FERC the power to protect homeowners through special pricing rules, but once it decides to do so, it cannot attempt to maintain control over FERC by exercise of the veto power. The choice may be hard, but the doctrine of separation of powers requires that it be made.

Attempts at practical justification of the congressional veto on the ground that in today's world the President threatens to dominate the co-equal legislative branch are also unpersuasive. In the first place, factual support for this proposition is dubious in view of the ever-shifting power balance between the two branches. Second, under our form of government no branch can lay claim to powers simply because they are thought to be useful or more efficient. *See e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*.[7] *Accord*, *Alaska v. A.L.I.V.E. Voluntary*,

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7/ Justice Brandeis has stated that: "[t]he doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion). Likewise, Justice Douglas has stated:

> We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many.

(footnote continued)

supra, 606 F.2d at 778-79. Finally, this argument was raised, though "somewhat obliquely," and rejected in *Buckley v. Valeo*, *supra*, 424 U.S. at 128. There, the Court swept aside the claim that the Appointments Clause should be read to allow the Congress to make appointments in order to avoid an erosion of congressional power, noting that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." 424 U.S. at 128-29.

In any event, there is no need to abandon our tradition of separation of powers, since Congress has more legitimate avenues than the one-House veto for checking Presidential excesses. As Madison foresaw (II Farrand 537), if Congress fears that an agency may abuse the statutory powers given it, Congress can enact statutes of short duration, with frequent opportunities to renew and modify an agency's authority. Further, Congress can tailor statutes specifically to its desires, and thereby limit the executive's discretion. Additionally, Congress can expand the scope of judicial review, or provide for special reviewing tribunals, if it believes that agencies

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(footnote continued:)
Youngstown Sheet & Tube Co. v. Sawyer, *supra*, 343 U.S. at 633 (concurring opinion). However, Justice Douglas and other members of the Court found it a price which the Nation must pay in order to maintain its liberty. *See also* *United States v. American Telephone and Telegraph Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977)(doctrine "often impairs efficiency" but enhances "long-term staying power of government" by "mutual accommodation").

may depart from congressional intent in their implementation of statutes. Finally, Congress can always prevent the implementation of a delegated power by passing new legislation, and it can properly delay implementation of an agency order for a reasonable period of time while Congress considers such legislation.[8/]

There are many alternatives open to Congress to control executive excesses. Even if they were not as efficient as the congressional veto -- a doubtful proposition in light of the results of the only empirical study of the workings of the legislative veto to date[9/] -- the availability of these alternatives shows that there is no pragmatic reason for redefining the separation of powers doctrine to meet congressionally-perceived modern needs. Congress can effectively control delegations to the executive without the use of the one-House veto power to overturn executive decisions.

8/ The Supreme Court has upheld the power of Congress to delay the effectiveness of executive actions, at least in the absence of special circumstances, in order to consider whether to legislate on the subject. Sibbach v. Wilson & Co., 312 U.S. 1 (1941). Petitioners do not challenge this delaying power, but only the veto of executive action by means other than the constitutional legislative process.

9/ See H. Bruff & E. Gellhorn, Congressional Control of Administrative Regulation, 90 Harv.L.Rev. 1369 (1977).

III. THE VETO UNCONSTITUTIONALLY DEPRIVES THE PRESIDENT OF THE OPPORTUNITY TO EXERCISE HIS VETO POWER UNDER ARTICLE I, SECTION 7.

As Youngstown Sheet & Tube Co. v. Sawyer, supra, makes clear, our government is one of limited powers. There is nothing in the Constitution which authorizes a single House to disapprove of any or all delegated executive actions concerning interstate commerce. There are, however, two specific provisions in the Constitution which do allow a single House -- the Senate of the United States -- to veto actions of the executive branch. Those provisions of Art. II, § 2, cl. 2 are in effect "one-House vetoes" over the power of appointments and the power to make treaties, and their specific inclusion strongly suggests that the courts ought to be reluctant to imply others in the Constitution. Nevada v. Hall, 440 U.S. 410, 425 (1979); Alaska v. A.L.I.V.E. Voluntary, supra, 606 P.2d at 774.

But beyond that, Art. 1, § 7 provides further evidence that any action of the legislative branch having the effect of law cannot go into effect unless it is presented to the President and either has his approval or is passed by a two-thirds majority of each House over his veto. The history of that provision makes it abundantly clear that the House cannot avoid the role of the President by the device of a one-House veto.

On June 4, 1787, after several days of debate, the delegates to the Constitutional Convention, acting as a Committee of the Whole, settled upon an executive headed by a single person. 1 Farrand 97. The debate then turned to whether this single executive needed an absolute veto power over legislation in order to protect his role, and the question was resolved in the negative. Id. at 103.[10/]

Thereafter, James Wilson joined Madison in an effort to give the judiciary a share of the veto power. Madison argued that a Council of Revision, including judges, was necessary to support an executive that would otherwise be too weak to protect itself against the legislature, and that this would also serve to strengthen the judiciary against the legislature. Id. at 139. However, the majority was of the opinion that maintaining the accountability of the executive was equally important, and that this could be achieved only if the veto was exercised by the Executive alone. Id. at 139-40, 144. See also II Farrand 74-79.

Persistent in his desire to seek the executive supported in some way by the judiciary in the exercise of the revisionary power, Madison proposed that "all acts, before they become laws should be submitted both to the Executive and the Supreme Judiciary Departments, that if either of these should object, 2/3 of each House, if both should object, 3/4 of each House, should be necessary to overrule the objections and give the acts the force of law." II Farrand 298. A compromise was struck, eliminating the role of the judiciary, but requiring a

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[10/] It is ironic that after the Framers refused to give the President an absolute veto to defend himself from the legislature, the legislature should now assert the right of an absolute veto to use against the executive.

3/4 vote by each House to overcome the President's veto. This proposal passed 6-4, with 1 delegation divided. Id. at 301. At the end of the day, the following event took place:

> Mr. Madison, observing that if the negative of the President was confined to bills, it would be evaded by acts under the form and name of Resolutions, votes, etc. -- proposed that "or resolve" should be added after "bill" in the beginning of section 13 with an exception as to votes of adjournment, etc. -- after a short and rather confused conversation on the subject, the question was put and rejected . . . .

Id. at 301-02 (emphasis in original).

However, the very next morning, a new motion was offered by Mr. Randolph, "putting votes, Resolutions, etc. on a footing with Bills." Id. at 304. Madison reports this as a renewal of his motion of the previous day in a "new form." No one noted any substantive differences, and it was approved by a vote of 9-1, 1 absent. Id. at 305. The overnight turnabout may be accounted for by the fact that reflection revealed that the proposal was intended to close a loophole, rather than to tip the balance of power among the branches.

Subsequently, debate returned to the topic of the proportion of each House necessary to override a Presidential veto. Mr. Williamson, who had carried the day a month earlier with his suggestion of 3/4, now felt that 2/3 would strike a better balance. Mr. Gerry agreed:

> 2/3 will be a considerable, perhaps a proper security. 3/4 puts too much in the power of a few men -- the primary object of the revisionary check in the President is not to protect the general interest, but to defend his own department.

The vote in favor of 2/3 was 6-4, 1 delegation divided. Id. at 587. Thus, with minor stylistic changes, the President's veto authority now appears as clauses 2 (concerning bills) and 3 (concerning other measures) of Article I, Section 7.

During the ratification debates, Alexander Hamilton summarized the concerns of the Framers:

> The propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands.

Federalist No. 73; accord, Federalist Nos. 48 and 51 (Madison).

From this sequence of debates it is clear that the Framers very deliberately created a single executive, with the power to exercise the qualified veto on his own initiative over every bill, resolution, vote, or similar measure having the effect of law. In doing so, they rejected many alternatives also designed to maintain a careful balance between the executive and legislative branches. The result is that all final actions having an effect on the public are covered. See United States

v. California, 332 U.S. 19, 28 (1947). The disapproval of FERC's incremental pricing rules by a single House has such an effect, and thus it cannot lawfully evade the possibility of a Presidential veto.

The handful of judicial opinions addressing the issue have expressed conflicting views on the constitutionality of one-House veto provisions. The holding of the Court of Appeals for the Ninth Circuit in the Chadha case, that such a veto provision is unconstitutional, has already been discussed. By contrast, the Court of Claims in Atkins, supra, held that Article I, § 7, clause 3, "applies solely to actions 'to which the Concurrence of the Senate and House of Representatives may be necessary,'" and that a one House veto "is not an act requiring such a concurrence." 556 F.2d at 1065. However, this approach has been rejected by the Supreme Court with the observation that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments." Kilbourn v. Thompson, supra, 103 U.S. at 182. Moreover, legal scholars have generally rejected the reading given clause 3 by the Atkins court, stating, for example, that:

> [i]t verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt.

Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif.L.Rev. 983, 1066 n.428 (1975). The result reached by the Atkins court means that a power denied by the Constitution to the two Houses of Congress, acting concurrently, can suddenly be made available by the simple expedient of eliminating the role of one of the Houses. Moreover, just as importantly, the Constitutional debates indicate that no such distinction between concurrent resolutions (requiring submission to the President) and simple resolutions (not requiring submission) was intended. The only explanation is Madison's, and he indicated that clause 3 was intended to require every Congressional action having the force of law -- that is, affecting persons outside of the Congress -- to be submitted for the approval or veto of the President.[11]

The Atkins court also supported its decision by "emphasiz[ing] that the subject matter of [the Salary Act] has historically been within the primary domain of Congress, not the Executive." 556 F.2d at 1065. But this rationale for avoiding the Presidential veto power has previously been rejected by the Supreme Court in United States v. California, supra. There the Court ruled that "Article 4, § 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,'" and that this power is "without limitation," so that "neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power." Nonetheless, Congress can take action even in this area only through "[a]n Act passed by Congress and signed by the President." *Id.* at 27. Thus, even though "both Houses of Congress passed a joint resolution quitclaiming to the adjacent states a three mile belt of . . . land," the resolution was of no effect where the President's veto was not overridden. *Id.* at 28. "Plainly" said the Court, "the resolution does not represent an exercise of the constitutional power of Congress to dispose of public property . . . ." *Id.* Just as plainly, the action of the House of Representatives here does not represent an exercise of the constitutional power of Congress to regulate commerce since Congress cannot avoid a Presidential veto by the expedient of not submitting its resolutions to the President.[12]

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[11] Petitioners' interpretation of clause 3 does not require that Congressional actions pertaining only to Congress -- internal housekeeping resolutions -- or resolutions not having the force of law -- resolutions merely expressing the "sense" of the House or Senate on matters of public concern -- need be subjected to a possible Presidential veto. Cf. Buckley v. Valeo, supra, 424 U.S. at 128.

Finally, in *Buckley v. Valeo*, *supra*, the Supreme Court was asked to decide the constitutionality of a one-House veto provision in the Federal Election Campaign Act, 2 U.S.C. § 438 (c), but declined to do so because the Court's manner of disposing of other issues made it unnecessary. 424 U.S. at 140 n.176. This was especially reasonable in view of the fact that the parties and numerous *amici curiae* had cumulatively devoted only about four pages of their lengthy briefs to the issue.[13]

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[12] Although the Ninth Circuit in *Chadha* never states its outright disagreement with *Atkins*, it makes no effort to distinguish it or argue with its reasoning. It is clear from references such as that in note 41 that *Chadha* rejected the approach of the Court of Claims majority in *Atkins*.

[13] *See* Brief of Appellants 208 n.9; Brief of the Attorney General as Appellee and the United States as *Amicus Curiae* 111-12 n.70; Brief of the Federal Election Commission 57-57 n.49; Reply Brief of the Appellants 112-13.

Nonetheless, Justice White in his concurring and dissenting opinion briefly expressed his view that the Article I, § 7 challenge to the one-House veto provision involved there should fail. Id. at 284-86.

There are several reasons why Justice White's conclusion does not defeat petitioners' challenge here. First, he appears to have examined the issue solely from the perspective of Art. I, § 7, and hence his views on the other issues are not known. Second, the constitutional question presented was an abstract one, not keyed to the actual veto of any particular rule. See 424 U.S. at 141 n. 177, Question 8(d). The principal thrust of his opinion on this issue seems directed to the question of whether the mere existence of an unexercised veto provision somehow interferes with the power of the President to pass on legislation. Because of its limited basis, his opinion does not apply here where a veto has taken place. That reading would also be consistent with his vote to affirm the dismissal of Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) which involved a broad challenge to the veto statute in the absence of a specific one-House veto. See Clark v. Kimmitt, 431 U.S. 950 (1977).

Petitioners recognize, however, that footnote 30 in Justice White's opinion does deal with the situation in which a rule has been vetoed, analogizing the situation to a bill which passes only one House. Once again, the Justice appears to be examining the issue only from the President's Art. I, § 7 perspective. Even from that narrow vantage, it is permissible to view the situation as if the status quo were maintained only if one disregards the effect of the veto on the agency and the affected public, as Justice White seems to do. Therefore, to the extent that his opinion cannot be explained in this fashion, we believe that the response on the merits given by Judge MacKinnon in his dissent in Clark v. Valeo, supra, 559 F.2d at 685-90, is the preferable analysis of this issue.

The Presidential veto provision was intended primarily as a check on Congressional encroachment upon executive administration and enforcement of the laws. The one-House congressional veto is a device to secure an overruling influence over executive enforcement of the law, while avoiding the checking power of the Presidential veto. It is thus constitutionally impermissible.

IV. THE ONE-HOUSE VETO PROVISION VIOLATES THE REQUIREMENT OF BICAMERALISM.

The second great check upon the institutional power of the Congress is the requirement of a bicameral legislature. Article I, § 1, vests all legislative powers "in a Congress" consisting of both "a Senate and House of Representatives." The attempt through section 202(c) to avoid this constitutional check, by allowing one House acting alone to nullify the statutory requirement for incremental pricing, violates this principle of bicameralism, which the Chadha court found from a reading of the Federalist Papers "to be one of the most fundamental checks on governmental power." Slip Op. at 41.

The principle of a bicameral legislature, which had been part of Montesquieu's plan of government, was part of the Virginia Plan, introduced by Edmund Randolph at the Constitutional Convention on May 29, 1787. Of the two branches of the legislature, one was to be elected by the people, the other by the first branch. Charles Pinckney's draft, based on like principles, was introduced the same day. Commenting on the need for two Houses in the legislature, Pinckney argued:

> The division of the legislature will be found essential, because, in a government where so many important powers are intended to be placed, much deliberation is requisite. No possibility of precipitately adopting improper measures ought to be admitted, and such checks should be imposed, as we find, from experience, have been useful in other governments . . .. It adds to that due deliberation, without which, no act should be adopted . . ..

III Farrand 110.[14/] On May 31, the division of the legislature was agreed to without debate while the Convention was acting as a Committee of the Whole (I Farrand 48), and on June 21 the Convention formally agreed to a bicameral legislature. Id. at 358.

Once it had been decided to divide the Congress in two, the debate concentrated on the proportion of representation which should be adopted for each House. This became the crucial decision of the Convention, very nearly creating a permanent

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14/ See also IV Elliot 257 (remarks of Charles Pickney before South Carolina Convention); II Elliot 445 (remarks of James Wilson before Pennsylvania Convention); II Elliot 285 (remarks of John Jay before New York Convention).

impasse between the large and small states. However, the "Great Compromise" was struck on July 16, with the small states managing to preserve an equal vote with the large states in the Senate, while agreeing to representation by population in the House of Representatives. Thus, the two Houses were to represent differing points of view; one representing the view of the people, the other representing the view of the States. In this way it was assured that each would act as a check on the other in their joint exercise of the legislative power. The Great Compromise was sealed into the Constitution by the provision in Article V that it could not even be altered by constitutional amendment unless each state gave its consent.

The concept of bicameralism as a check on each House of Congress was given its fullest expression by the Committee of Detail in its report of August 6:

> The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other.

II Farrand 177.

This clause was taken up by the full Convention on August 7, and Gouverneur Morris proposed to strike the phrase "all cases" in favor of the phrase "legislative acts," in response to Colonel Mason's observation that there were some cases in which the negative of each branch might not be intended to be given, as in the case of balloting for appointments. This led to a short debate as to whether each branch should have a negative over appointments. Colonel Mason further argued that the words "legislative acts" might be interpreted to include treaty-making, where it was intended that only the Senate should participate. At this point, Madison proposed that the ambiguous clause be eliminated entirely, by striking out the words "each of which shall in all cases, have a negative on the other . . .." He explained that the idea had been sufficiently expressed in the preceding sentence vesting the "legislative power" in "distinct bodies," and that "the respective powers and mode of exercising them were fully delineated in a subsequent article." II Farrand 197. By subsequent article, he apparently referred to what became Article II, which specifically enumerates those instances in which the concurrence of both Houses is not necessary. Madison's motion passed, 7-3.[15/]

Madison voiced no disagreement with the idea that each House would, "in all cases, have a negative on the other." His amendment to delete this clause was designed to eliminate the ambiguity of repeating here what was already being stated more fully elsewhere. It thus seems that the Framers intended that the concurrence of both Houses be required, except in those cases specifically provided for elsewhere in the Constitution,

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[15/] When this clause was finally reworked by the Committee of Style and reported out to the Convention on September 23, the phrase, ". . . to consist of two separate and distinct bodies of men, a House of Representatives and a Senate," read "which shall consist of a Senate and a House of Representatives." II Farrand 565. No one remarked on this rewording. Id.

as in the treatymaking and appointment powers enumerated in Article II. In other words, two independent combinations of interests. represented by the two Houses of Congress, would be necessary in order to take actions affecting members of the public. In this way, the Framers attempted, as Madison said elsewhere, to "introduce checks, which will destroy the measures of an interested majority . . . ." I Farrand 108.

Bicameralism, which made possible the most important compromise in the formation of the Federal Union in order to satisfy the separate interests of large and small states, requires that each House have the opportunity to negate the actions of the other whenever those actions affect persons outside that House. The one-House veto emasculates this principle by allowing one House, acting alone, to undo legislative compromises through the expedient of vetoing decisions applying the laws resulting from those compromises. Because bicameralism is an independent limitation on the powers of either House acting alone, it precludes a one-House veto from having any effect, quite apart from any violation of any other constitutional limitation.

It is difficult to imagine a situation in which there was a more tenuous compromise than the Natural Gas Policy Act of 1978, as its history, detailed at pp. 3-10, supra, demonstrates. There can be no doubt that the compromise could never have been accepted by both Houses without the protection afforded homeowners through the promise of incremental pricing. Yet that compromise has been wholly undone by a one-House veto despite the essential role of incremental pricing in forging the legislative compromise. Moreover, although the Conference Report was debated for nine days in the Senate and two days in the House, no member even hinted that a one-House veto could undo the entire compromise.[16] Yet its operation allows precisely the kind of irresponsibility which the Framers sought to avoid through bicameralism. Thus, quite apart from any violation of separation of powers or the Presentment Clause, the action by the House on May 20, 1980 is invalid since, unless specified in the Constitution, acts of one House affecting the public violate the "Great Compromise" embodied in our chosen form of bicameralism.

V. THE VETO POWER IS UNCONSTITUTIONAL BECAUSE IT INVOLVES A DELEGATION OF AUTHORITY WITH NO STANDARDS AND WITH NO JUDICIAL REVIEW.

Even if this Court concludes that a federal statute can constitutionally delegate to one House of Congress the power to veto regulations adopted by an independent regulatory agency, the delegation in section 202(c) is unconstitutional because it is wholly lacking in standards and its exercise is not subject to judicial review. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Industrial Union Dept. AFL-CIO v.

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[16] As previously noted, there was no veto in either the Senate or House provisions on incremental pricing. See p. 8, supra.

American Petroleum Inst., 100 S.Ct. 2844, 2878-87, 48 U.S.L.W. 5022, 5039-43 (1980)(Rehnquist, J., concurring in the judgment).[17/]

While there can be little doubt that delegations of functions to the executive branch, including independent agencies, are generally upheld, see K. Davis, Administrative Law of the Seventies, §§ 2.01, 2.04 (1976), the doctrine of undue delegation is still alive as evidenced by the Supreme Court's concern about it as a reason for narrowly construing a statute in National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974). The most recent opinion dealing with this issue in any depth is Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971)(three-judge court). Although upholding the delegation in that case, the court's lengthy discussion makes it clear that challenges such as this are not foreclosed and that there are some delegations that are so broad that courts will hold them to be improper.

Two sentences in Amalgamated highlight the defects in the in the legislative veto at issue here and distinguish it from the provisions of the Economic Stabilization Act upheld there:

> We do not think that it can be said that the possibility of controls beyond the initial freeze was left without any standard other than the President's unfettered discretion, including the discretion to be unfair and inequitable. This is not a case where Congress indicated an intention to leave the matter wholly to the discretion of the President without any possibility of judicial review.

[17/] This argument also assumes, without conceding, that granting the power to a single House of Congress would not run afoul of the appointment provisions of Art. II, § 2, cl. 2, which was the basis for the Supreme Court's holding in Buckley that the Election Commission as originally constituted was unconstitutional.

337 F. Supp. at 757. Section 202(c) provides neither of the elements deemed essential in Amalgamated. There is no attempt to circumscribe the basis upon which a veto can be exercised. Either House can veto a rule because it is unauthorized, unwise, or unworkable, or because it fails to treat industrial users equally, or for no reason at all.[18/] Indeed, this delegation has gone so far that it does not include a single word attempting to describe the situations in which a veto is proper. As the Supreme Court has noted in striking down a loitering statute as unconstitutionally vague: "Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). In short, the deficiency in this delegation is not simply an inadequate standard, but the total absence of any standard at all.

Equally fatal is the absence of any provision for judicial review. As the court noted in Amalgamated, "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers." 337 F. Supp. at 759. Given the absence of standards

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[18/] The Chadha court aptly described exercise of a legislative veto as the "[s]ummary reversal of the Executive's decision by the Legislature in a single case, without an indication of a need to change the standards or general rules to be applied." Slip Op. at 38.

governing the exercise of the veto, there is plainly nothing to review even if a statutory basis could be found for doing so.

It is true, of course, that in general Congress' power to enact legislation is not constrained by detailed standards nor is it subject to general judicial review. But even that assertion overstates the freedom of Congress because Art. I, § 8 limits the subjects of legislation to those enumerated, and the Bill of Rights and other constitutional provisions further restrain the legislative power. Perhaps more important in practical terms is that, unlike the veto exercised here, legislation requires the concurrence of two Houses and the opportunity for a Presidential veto. These limitations provide vital checks on the unfettered discretion of either House, checks that are absent when one House is delegated standardless and unreviewable discretion of the kind permitted here. Accordingly, even if all of petitioners' other constitutional arguments are rejected, the veto still must fall under the doctrine of undue delegation.[19]

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[19] Although its decision did not rest on that theory, the Chadha court recognized the problem of undue delegation created by a legislative veto. Slip Op. at 24-25 and note 33.

CONCLUSION

The crucial question which this Court must answer is whether the Framers intended to permit a single House of Congress the virtually unlimited authority to override a duly enacted statute through the mechanism of vetoing the regulations which are needed to carry it out. In our view, the congressional veto so tips the balance of power in favor of a single House of Congress that it transgresses the carefully established dividing lines between the three branches of government and eliminates vital checks built into the system. Whatever, problem is perceived by Congress with administrative agencies not carrying out their mandates, the congressional veto is an unconsitutional solution. As the Ninth Circuit held in Chadha:

> We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or vitality, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the [matter] outside the executive and judicial process.

Slip Op. at 44.

For all of the foregoing reasons, the veto exercised by the House of Representatives should be held to be unconstitutional.

Respectfully submitted,

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APPENDIX

RELEVANT STATUTES

Natural Gas Policy Act of 1978
Public Law 95-621, 92 Stat. 3351

Section 201, 15 U.S.C. § 3341 (Supp. 1978)

§ 3341. Industrial boiler fuel use

(a) In general. -- Not later than 12 months after November 9, 1978, the Commission shall prescribe and make effective (and may from time to time amend) a rule designed to provide for the passthrough, in accordance with the provisions of this subchapter, of the costs of natural gas which are --

(1) described in section 3343 of this title; and

(2) incurred by any interstate pipeline.

(b) Initial application. -- The requirements of the rule under this section shall apply with respect to the boiler fuel use of natural gas by any industrial boiler fuel facility.

(c) Definitions. -- For purposes of this section --

(1) Industrial boiler fuel facility. -- The term "industrial boiler fuel facility" means any industrial facility, as defined by the Commission, which uses natural gas as a boiler fuel and which is not exempt under section 3346 of this title.

(2) Boiler fuel use. -- The term "boiler fuel use" means the use of any fuel for the generation of steam or electricity.

Section 202, 15 U.S.C. § 3342 (Supp. 1978)

§ 3342. Amendment expanding application for other industrial uses

(a) In general. --

(1) Commission rule. -- Not later than 18 months after November 9, 1978, the Commission shall, by rule, prescribe an amendment to the rule required under section 3341 of this title designed to provide for the passthrough, in accordance with the provisions of this subchapter, of the costs of natural gas which are --

(A) described in section 3343 of this title; and

(B) incurred by any interstate pipeline.

(2) Effectiveness. -- The amendment required by this section, and any amendment to the rule under section 3341 of this title which is applicable to facilities to which the amendment required by this section applies (other than a technical or clerical amendment), shall take effect only as provided under subsection (c) of this section.

(b) Expanded application. -- The requirements of the rule under section 3341 of this title, as amended under subsection (a) of this section, shall apply with respect to the industrial use of natural gas (as defined by the Commission in such rule), including boiler fuel use of natural gas (as defined in section 3341(c)(2) of this title) by --

(1) any industrial boiler fuel facility (as defined in section 3341(c)(1) of this title); and

(2) any industrial facility which is within a category defined by the Commission in such amendment as subject thereunder to the requirements of such rule which is not exempt under section 3346 of this title.

(c) Congressional review. --

(1) In general. -- Any amendment, the effectiveness of which is subject to this subsection, shall take effect beginning with the first month which begins more than 30 days after the first 30 calendar days of continuous session of Congress (determined in accordance with section 3417(b) of this title after a copy of such amendment has been submitted to each House of the Congress or on such later date, not more than 90 days thereafter, as may be provided in such amendment unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in section 3417(c)(3) of this title with respect to such amendment.

(2) Authority in the event of congressional disapproval.--

(A) Authority to resubmit. -- If either House of the Congress adopts a resolution of disapproval with respect to the amendment required under subsection (a) of this section (or any amendment proposed and submitted under this subparagraph), the Commission may thereafter submit to each House of the Congress an amendment, satisfying the requirements of subsections (a) and (b) of this section, which amendment shall take effect as provided under paragraph (1).

(B) Limitation. -- The authority of subparagraph (A) may not be exercised --

(i) earlier than 6 months after the date of the adoption of the most recent resolution of disapproval with respect to any such amendment under this section; and

(ii) later than 2 years after the date of the adoption of any resolution of disapproval described in section 3417(c)(3) of this title with respect to the amendment required under subsection (a) of this section.

Section 206, 15 U.S.C. § 3346 (Supp. 1978)

§ 3346 Exemptions

(a) Small existing industrial boiler fuel users. --

(1) Interim exemption. -- During the period preceding the effective date of any permanent exemption under paragraph (2), the rule required under section 3341 of this title shall

not apply with respect to any boiler fuel use of natural gas by any industrial boiler fuel facility in existence on November 9, 1978, if such use of natural gas by such facility does not exceed an average of 300 Mcf per day during any month of a base period determined appropriate by the Commission.

(2) Permanent exemption. --

(A) General rule. -- Not later than 18 months after November 9, 1978, the Commission shall prescribe and make effective a rule providing for the exemption of any small industrial boiler fuel facility from the rule required under section 3341 of this title (including any amendment under section 3342 of this title to such rule).

(B) Definition. -- For purposes of this paragraph, the term "small industrial boiler fuel facility" means any industrial boiler fuel facility in existence on November 9, 1978, that had an average per day use of natural gas as a boiler fuel during the month of peak use during calendar year 1977 which did not exceed the lesser of --

(i) 300 Mcf; or

(ii) such average daily rate of use during a month of peak use as the Commission determines in such rule is necessary to assure that the volume of natural gas estimated by the Commission to have been used for boiler fuel during calendar year 1977 by facilities which are exempted under this paragraph does not exceed 5 percent of the total volume of natural gas estimated by the Commission to have been used for boiler fuel transported by interstate pipelines and used during calendar year 1977 as a boiler fuel.

(b) Agricultural users of natural gas. --

(1) Interim exemption. -- During the period preceding the effective date of any permanent exemption under paragraph (2), the rule prescribed under section 3341 of this title shall not apply to any facility to the extent of any agricultural use of natural gas.

(2) Exemption by rule. -- Not later than 18 months after November 9, 1978, the Commission shall prescribe and make effective a rule providing for the exemption from the rule required under section 3341 of this title (including any amendment under section 3342 of this title to such rule) any facility with respect to any agricultural use of natural gas for which the Commission determines that an alternative fuel or feedstock is not --

(A) economically practicable; or

(B) reasonably available.

(3) Agricultural use defined. -- For purposes of this subsection, the term "agricultural use", when used with respect to natural gas, means the use of natural gas to the extent such use is --

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, or crop drying; or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food.

(c) Schools, hospitals, and certain other facilities. -- The rule under section 3341 of this title (including any amendment to such rule under section 3342 of this title) shall not apply to --

(1) any school, hospital, or other similar institution;

(2) the generation of electricity by any electric utility; or

(3) to the extent provided by the Commission by rule, any qualifying cogenerator (as defined in section 796(18)(B) of Title 16).

(d) Other exemptions. --

(1) In general. -- The Commission may, by rule or order, provide for the exemption, in whole or in part, of any other incrementally priced industrial facility or category thereof from the rule prescribed under section 3341 of this title (including any amendment under section 3342 of this title to such rule).

(2) Congressional review. -- Any rule which provides for any exemption under this subsection may take effect after the expiration of the first 30 calendar days of continuous session of Congress (determined in accordance with section 3417(b) of this title) after a copy of such rule has been submitted to each House of the Congress, unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in section 3417(c)(3) of this title, with respect to such rule.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-2184, 80-2312

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
and
PROCESS GAS CONSUMERS GROUP, *et al.*,
Intervenors.

On Petitions For Review Of Orders
Of The Federal Energy Regulatory Commission

REPLY BRIEF OF PETITIONERS

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May 26, 1981

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Nos. 80-2184, 80-2312

REPLY BRIEF OF PETITIONERS

In this reply brief, petitioners will respond to the arguments made by the respondent Federal Energy Regulatory Commission ("FERC" or the "Commission"), the three sets of intervenors -- the Process Gas Consumers Group, et al. ("Process Gas Group"), the American Gas Association, et al. ("AGA"), and the Petrochemical Energy Group ("Petrochemical") -- and by the amici curiae United States Senate and the Speaker of the United States House of Representatives (the "Congressional amici"). Because in many instances all five briefs make similar arguments, all of the parties opposing petitioners will be collectively referred to as respondents.

In the first part of this reply (Points I-III), petitioners respond to non-constitutional arguments: that FERC's August 1, 1980, revocation order mooted this controversy; that the case should be dismissed because the legislative veto is not severable; and that this case should have been filed in the district court, not the court of appeals. Having explained why the Court should reach the merits, we then respond to the constitutional defenses to the veto raised by the Congressional amici and by the AGA.

SUMMARY OF ARGUMENT

The revocation order does not deny petitioners the opportunity to litigate the constitutionality of the veto because the requirement to issue the Phase II incremental pricing rule was mandatory. To allow respondent FERC to revoke the rule would be tantamount to allowing it to refuse to issue it entirely, which it had no authority to do. The power to amend in section 201(a) does not constitute authority to revoke because that provision allows only amendments, not repeals, in contrast to the broader language contained in 5 U.S.C. § 551(5) and in 15 U.S.C. § 3411(a).

Even if FERC had the power to revoke Phase II entirely, its failure to follow the notice and comment requirements of 5 U.S.C. § 553 invalidates the revocation. The claim that there was "good cause" for noncompliance should be rejected since FERC failed to make a good cause finding in its August 1 revocation order, as required by section 553, and there is no basis for such a finding in any event. The good cause exception to the notice and comment requirement is a narrow one, to be used only in exceptional circumstances not presented here.

Moreover, the failure to afford the public the opportunity to comment was not a mere technical violation. The possibility of repeal had never been raised by FERC or by any party, and thus petitioners had no opportunity to respond to it. Furthermore, the reasons given for repeal, while perhaps justifying some modification of the Phase II rule effective date, do not form an adequate basis for total revocation. If comments had been allowed on the proposal, petitioners could have been heard, and FERC could have entered an appropriate order taking into account the legitimate concerns of all interested parties.

Respondents' second argument, that the veto is not severable from the authority to issue the Phase II rule and therefore petitioners' claim is moot, fares no better. The issue of severability turns on an evaluation of what Congress would have done if it had known in advance that the veto was unconstitutional. Nothing in the NGPA or its legislative history suggests that there would have been no Phase II incremental pricing rule without the veto. Moreover, if the veto is not severable from Phase II or from Title II as a whole, it is also not severable from the price deregulation provisions of Title I. In that case, the price controls would revert to the still existent pre-1978 Natural Gas Act, under which petitioners would be better off than with no Phase II rule. Thus, in either event, petitioners have a sufficient stake in the outcome of this controversy to litigate the constitutional issue.

Third, the Congressional amici argue that this Court lacks jurisdiction because this case should have been filed in a district court. In the face of the broad jurisdictional grant in 15 U.S.C. § 3416(b), amici point to no case in which FERC has been sued in a district court in circumstances remotely resembling these.

Amici's attempt to analogize this case to those involving an agency's refusal to issue a requested rule erroneously characterizes the nature of this review proceeding, and thus the authorities they cite are inapposite.

As to the merits of the constitutional claim, the defenders of the veto admit that the action of the House of Representatives was a legislative action and then they try to explain why it did not need the concurrence of the Senate and subsequent presentation to the President as do all other statutes. Initially, they contend that the Phase II rule was merely a proposal whose rejection by the House of Representatives has no constitutional significance. That view cannot stand because it leaves unexplained how such a proposal, if it had not been vetoed, could have ripened into a law merely by the passage of time, without the approval of both Houses and the President. Second, amici claim that existing practices in four areas sustain the veto. That contention too should be rejected because three of the examples cited are both distinguishable from the veto and, more importantly, their lawfulness is itself highly questionable. The fourth -- the absence of a requirement for presidential approval for a constitutional amendment -- supports petitioners' position, not respondents', since it is based on a Supreme Court interpretation of the Constitution in which the Court concluded that there was an exception to the normal legislative process for constitutional amendments. Since there is no exception applicable to this case, the presence of the amendment exception suggests that there is no basis here for allowing a deviation from the general rule of two-House concurrence and Presidential approval for legislative actions.

I. THE COMMISSION'S AUGUST 1 ORDER DID NOT MOOT THE ISSUE OF THE CONSTITUTIONALITY OF THE ONE-HOUSE VETO.

Respondents contend that the order of August 1, 1980, in which the Commission purported to revoke its Phase II incremental pricing regulation, was legally sufficient to deny petitioners the opportunity to litigate the constitutionality of the House of Representatives' veto of the Phase II rule. That contention should be rejected for three separate, but related, reasons: FERC lacked the power to repeal the rule entirely; if it had the power to repeal, it was required to provide notice and opportunity for comment before doing so; and failure to provide for public input was particularly harmful here since the reasons given for repeal are insufficient to permit FERC to do more than postpone the effective date pending court review, as public comments would have made clear.

A. FERC Lacked The Power To Repeal The Phase II Rule.

The Commission's decision to revoke the Phase II rule was in direct response to petitioners' petition for rehearing which was filed on June 5, 1980, as required by 15 U.S.C. § 3416(b). See ECEE, Inc. v. FERC, 611 F.2d 554 (5th Cir. 1980). That petition sought only an amendment to the May 6 rule to eliminate the portion of the effective date provision, which made the rule's effectiveness conditional on the failure of either House to veto it, on the ground that the veto was unconstitutional. In all other respects petitioners sought to have the rule remain in place. If FERC had agreed -- not an impossible notion in light of the long-standing efforts of the Executive Branch to test the constitutional question -- presumably industry would have sued, and the issue joined in that way. On the other hand, if the

Commission had chosen to remain neutral, then petitioners would have been the challengers to the effective date provision. But the Commission chose neither of those options. Instead, more than two months after the veto, FERC decided to repeal the rule entirely in an attempt to avoid a constitutional challenge from either direction. That maneuver, however, cannot be allowed to succeed in frustrating petitioners' right to judicial review.

As set forth in the second petition for rehearing, which objected to the attempted revocation, section 202 of the Natural Gas Policy Act of 1978 ("NGPA") is mandatory, and hence the Commission lacked the authority to revoke the Phase II rule entirely. (App. A 17-18). The sole exception contemplated by Congress to the requirement of a Phase II rule arises from the veto provision of section 202(c). The mandatory nature of FERC's obligation can be seen not only from the language of section 202, and from the legislative history in which the term "required" is used to describe the Commission's Phase II duty, S. Rep. No. 95-1126 (H.R. Conf. Rep. No. 95-1752) 95th Cong., 2d Sess. 94-96 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 9011-13, but even the Commission itself recognized the fact that it had no choice when it issued the rule on May 6. (App. B 27).

Respondents point to section 201(a), which gives FERC power to amend the incremental pricing rules issued under it, and note that Phase II is actually an amendment to such rules. From those observations they conclude that the repeal of Phase II is authorized by that provision. There can be no question that FERC had the power to modify the Phase II rule it promulgated, both as to the substantive provisions of any Phase I or Phase II rules it issued or to make changes in matters such as the effective date. But the power to amend under section 201(a) is not the same as the power to repeal which FERC purported to exercise. This difference is strongly suggested by the structure of the incremental pricing provisions and their centrality to the 1978 legislative compromise and also by the Administrative Procedure Act in its definition of "rule making" in section 551(5) of Title 5, in which are included the three categories of "formulating," amending, or repealing a rule." Similarly, section 501(a) of the NGPA, 15 U.S.C. § 3411(a), gives the Commission the power "to prescribe, issue, amend, and rescind [its] rules . . . ." Since what the Commission did was to "repeal" or "rescind" a rule, not "amend" it, the action was not authorized by section 201(a), which only allows FERC to "amend."

There is another substantial reason which compels the conclusion that FERC's powers should not be construed to permit it to repeal the Phase II rule. If allowed, the principal effect of the repeal, if not its principal purpose, would be to insulate the veto from judicial review. Surely no agency, once one of its rules were vetoed, could long resist the entreaties of Congress to repeal it so that the veto power could remain untested. As is plain from its arguments in both this case and in Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), appeal pending, No. 80-1832 (Sup. Ct.), Congress is doing its best to see that the issue is not decided.[1/]

[1/] See 127 Cong. Rec. S 4416 (Daily Ed. May 6, 1981)(remarks of Senator Baker supporting the resolution authorizing the filing of an amicus brief in this proceeding, observing that "a judicial determination of the constitutional issues is a matter of last resort.").

While in this case the attempted repeal was issued in response to the mandatory petition for rehearing, in the next case the agency could simply do it *sua sponte* or perhaps include an automatic revocation clause in the body of the rule.[2/]

It is plain that the veto by the House of Representatives deprived petitioners and others of the intended benefits of Phase II. Therefore, nothing in the NGPA or elsewhere should be construed as authorizing action which would also deprive them of their right to obtain judicial review of the validity of that veto.

B. The Attempted Repeal Is Void Because FERC Failed To Comply With 5 U.S.C. § 553.

Even assuming that FERC has the power to repeal the Phase II rule, it did so by means that violate 5 U.S.C. § 553 since it did not provide public notice and an opportunity for comment on the repeal before putting it into effect. In response to petitioners' claim of a section 553 violation, FERC has conceded the applicability of that provision, but contends that there was "good cause" for denying them an opportunity to comment, and hence the repeal is valid. That contention must be rejected for several reasons.

First, section 553(b)(B), which contains the "good cause" exception, specifically requires that the agency "incorporat[e] the finding and a brief statement of the reasons therefore in the rule issued . . .." However, there is no mention in the

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2/ Indeed, Congress might well provide in the future that any rule which is vetoed is void and of no force and effect, thereby seeking to erect further barriers against judicial review should an agency be willing to stand up to those with the power of the purse strings.

August 1 repeal order of "good cause," let alone are there any reasons given for dispensing with the notice and comment requirement on the statutory grounds that it was "impracticable, unnecessary, or contrary to the public interest . . . ." That alone is sufficient to invalidate the repeal since the requirement of a specific finding is not a mere technicality but is included to prevent an agency from making post hoc rationalizations for failing to apply the APA. See National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 384 (2d Cir. 1978); American Federation of Government Employees v. Block, No. 79-2128 (D.C. Cir. March 18, 1981), Slip op. at 5. Moreover, even if FERC had included a statement of good cause in its order, it would not have been warranted in dispensing with public rulemaking procedures because that exception is an extremely narrow one that is inapplicable here.

This Court has repeatedly explained that the exceptions to the APA's notice and comment requirement must be "narrowly construed and only reluctantly countenanced." State of New Jersey v. United States Environmental Protection Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980). See also American Federation of Government Employees v. Block, supra, Slip op. at 9, n.6; American Bus Ass'n v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). As the Senate Judiciary Committee emphasized:

> The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due and required execution of the agency

> functions would be unavoidably prevented by its undertaking public rule-making proceedings.

S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946), quoted with approval in State of New Jersey v. EPA, supra. Courts interpreting the legislative history have repeatedly cautioned that this exception should not be used "to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." United States Steel Corp. v. Environmental Protection Agency, 595 F.2d 207, 214 (5th Cir. 1979). Accord, Sharon Steel Corp. v. Environmental Protection Agency, 597 F.2d 377, 379 (3rd Cir. 1979).

It is clear that no emergency or similar exceptional circumstances justified FERC's failure to comply with the APA in this case. Indeed, more than two months passed between the time of the veto and the agency's decision to repeal. Nor can the duty to respond to the petition for rehearing excuse the refusal to allow public comment. As the courts have concluded, "the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception." U.S. Steel Corp. v. EPA, supra, 595 F.2d at 213, quoted in State of New Jersey v. EPA, supra, 626 F.2d at 1042.

Thus, in State of New Jersey, supra, where EPA invoked the exception in light of Congress' direction that it enact certain regulations within 180 days of the enactment of an amendment to the Clean Air Act, the Court found that EPA could nevertheless have published proposed rules, and therefore it set EPA's action aside. The Second Circuit reached the same conclusion when, in response to a congressional enactment, FDA issued final label requirements for foods for special dietary uses without notice and comment. National Nutritional Foods Ass'n v. Kennedy, supra, 572 F.2d at 385-86. See also Mobil Oil v. Department of Energy, 610 F.2d 796, 803 (T.E.C.A. 1979)(rapidly approaching expiration of legislation did not constitute "good cause").

Even regulations adopted as "interim rules" in response to a court order or congressional directive have been set aside for failure to comply with section 553. For example, in American Iron and Steel Institute v. EPA, 568 F.2d 284, 292(3rd Cir. 1977), the Court invalidated interim final rules issued without public comment despite an expressed need to expedite implementation of the Federal Water Pollution Control Act, including a court-ordered deadline for promulgation of the regulations, where the agency had been under that order for four months. Accord, Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980); but see American Federation of Government Employees v. Block, supra (fact that agency was under court order to issue regulations held sufficient to justify the lack of public input).

This Court recently reviewed the "good cause" exception in the context of an agency's postponement, without notice and comment, of the implementation of regulations requiring life-saving equipment for miners. Council of the Southern Mountains, Inc. v. Donovan, ___ F.2d ___, No. 80-2536 (April 16, 1981). In that case, the agency had published a statement relying on the "imminence of the deadline" for implementing the regulations as grounds for dispensing with public procedures. After first noting that such a rationale "is one that permits avoidance of APA procedures only in exceptional circumstances" (Slip op. at 15), the Court concluded that five factors, in combination, rendered that a special case justifying a rare exception to section 553. These factors were (1) that the circumstances requiring the agency to postpone implementation were due to delays in testing the equipment which were beyond the agency's control, (2) that the agency acted diligently to overcome the hurdles created by other parties, (3) that the record indicated that the agency intended to implement the regulations on schedule, (4) that the postponement of the implementation was for a relatively short period of time, and (5) that implementation within the extension was fully anticipated. Id. at 16-19. Obviously, none of those factors, or any remotely analogous to them, can justify the failure to allow public comment here.

The application of these decisions, concluding that the exception is a narrow one, is particularly justified by the actual reasons given by FERC after petitioners pointed out the failure to comply with the APA. In its order of October 1, the Commission contended that good cause was satisfied because notice was "unnecessary" since there had been adequate notice and opportunity for comment on the original proposed Phase II rule. (App. A 23). That argument overlooks the fact that nothing in the original proposal, or in any subsequent Commission proposal, or for that matter its final rule, even hinted at the possibility of total repeal or no rule at all. Indeed, in its statement supporting the final rule, the Commission specifically rejected industry proposals to delay Phase II or not to issue the rule at all on the ground that it had no choice in the matter. (App. B 27). Thus, it is clear that neither petitioners nor anyone else had the slightest idea that repeal was in the mind of the Commission, and therefore petitioners and the public were denied any notice and any meaningful opportunity to comment on the specific advantages and disadvantages of that proposed action. While not every change in a rule must be noticed in the Federal Register, major changes in the Commission's thinking cannot be sprung on interested parties at the last moment and still meet the requirements of section 553. *Spartan Radiocasting Co. v. Federal Communications Commission*, 619 F.2d 314, 321 (4th Cir. 1980); *cf*. *Sea-Land Service Inc. v. Federal Maritime Commission*, ___ F.2d ___, No. 79-2493 (D.C. Cir. April 14, 1981) slip op. at 13-19. Thus, the failure to comply with section 553(b) invalidates the attempted repeal.[3]

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[3] Both the Process Gas Group and the AGA, but not FERC, argue that section 506(a)(2) of the NGPA, 15 U.S.C. § 3416(a)(2), excuses FERC's failure to seek public comment on its proposed revocation because it allows the agency to modify an order following a petition for rehearing "without further hearing." (Process Gas Br. 47-50; AGA Br. 33). There are several reasons in addition to fundamental notions of fairness why that provision is of no help to the intervenors. First, it is not part of section 506(b), under which review is sought here. While *ECEE Inc. v. FERC*, *supra*, imports certain of section 506(a)'s requirements into section 506(b), it is doubtful that this one is included, largely because it seems directed at requirements for a "hearing" which is the kind of proceeding under (a) but not (b). Second, dispensing with another hearing is very different from dispensing with notice and an opportunity to submit comments on a new proposal. Third, the section seems merely to allow the agency to grant all or substantially all of what a petition for rehearing has requested, not act on a wholly new proposal as to which no one, not even the petitioners, had any advance warning.

C. The Failure To Provide For Public Comment Is Particularly Important In Light Of The Reasons FERC Offered To Support Repeal.

Finally, the failure to give petitioners notice that a repeal was being contemplated was especially harmful because of the reasons which the Commission offered to justify repeal, as opposed to other options such as an amendment to the effective date. If those reasons had been the subject of public scrutiny, responses to them could have been readily provided that would have taken into account the Commission's legitimate concerns without necessitating outright repeal.

One of the objections raised by FERC is that if the rule went into effect after a judicial determination of unconstitutionality, it would create havoc because market conditions then might be very different from what they were in 1980. (App. A 11-13). Thus, according to FERC, amending the effective date provision in the manner petitioners sought would be ill-advised. This objection, however, is based on a misunderstanding of what the petition for rehearing contemplated. Petitioners sought only an amendment to the effective date that would have made the rule effective during the summer of 1980; they did not focus on the problems associated with delays occasioned by judicial review. However, if the issue had been presented, there is a ready solution to that and other problems raised by FERC (which are more fully discussed at pp. 16-18, *infra*) that could have been supplied if a reasonable opportunity to comment had been provided.

Second, the Commission suggested that it would be improper to put its Phase II rule into effect after it had been vetoed because FERC had not made many of the social and economic judgments relating to Phase II on the assumption that Congress would do so itself. (Id. at 10-11). Once again, that response is inadequate to justify the repeal. In the first place, an examination of the statement supporting the Phase II rule demonstrates that FERC gave the matter a detailed and searching examination. (App. B 18-20 (Introduction) and 25-54 (Public Comments and Commission Finding on the Proposed Phase II Rule)). Moreover, it is clear that the Commission did not abdicate its role to decide among alternatives, as evidenced, for example, by its decision to exempt small non-boiler fuel users (App. B 30-32) and to adopt a single-tier alternative price ceiling instead of a three-tier ceiling as consumer groups, including petitioner Consumer Energy Council of America, had urged (App. B 32-35). Finally, nowhere in that statement of reasons (as opposed to its post hoc statement in the revocation order) does the Commission suggest that it did anything less than Congress told it to do under the specific statutory directions before it.

Furthermore, whether it did or did not carry out Congress' directions in issuing the Phase II rule is a question of law which can only be answered by examining the statute and its legislative history. It may be that the Commission was given no more discretion than it exercised and that all of these social and economic judgments were reserved to Congress. Or it may be that FERC did not consider all of the relevant factors and that its Phase II rule would have to be set aside for that reason. But

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that question is a legal one which has nothing to do with repeal and cannot at this time be assumed to be decided one way or another. At most FERC can suggest that in the absence of a veto it might have questioned whether the statute gave it more discretion than it had previously believed to be the case, and that in light of a declaration that the veto was unconstitutional, it might wish to reexamine the issue anew. That, of course, is a reason justifying at most a much less drastic remedy than repeal, and hence cannot be the basis for the agency's revocation order.

There is another reason which is offered to justify repeal which has some merit, but only insofar as it suggests the need for some lesser modification of the rule. It seems almost certain that no matter how promptly this Court is able to hear this case and decide it, someone will try to take it to the Supreme Court. By the time that Court either denies review or rules on the merits, several years are likely to have passed since the rule was issued. Petitioners recognize that in that event, market conditions may have changed, lessons may have been learned from Phase I, other factors not previously deemed important may take on new significance, and therefore there may be justifications for modifying the present Phase II rule before it is put into effect. But a modification in the effective date that would have allowed FERC to take a second look at the situation after a final decision declaring the veto to be unconstitutional is a very different provision from total repeal, which is what the Commission must justify.

The intervenors raise a related point in their briefs which is not without some force. They argue that if this rule were to go into effect immediately at the conclusion of judicial review in this case, they would have been denied their own opportunities to move for rehearing and perhaps seek judicial review of the rule or at least the portions to which they object. See e.g., AGA Br. 65; Process Gas Br. 49. They correctly point out that the House's veto cut off their chances to seek rehearing and court review since there was nothing for them to object to once the House vetoed Phase II.

Petitioners acknowledge that this concern is a legitimate one and that it would be unfair to deny the intervenors and others similarly situated at least an opportunity to raise before both FERC and the courts any objections they may have. But that goal could have been achieved by an amendment to the effective date provision that would have permitted the filing of petitions for rehearing to be submitted within thirty days from the date on which the declaration of unconstitutionality became final. Courts have recognized the need for practical solutions to similar effective date problems, see VEPCO v. United States Environmental Protection Agency, 610 F.2d 187 (4th Cir. 1979), and surely if the Commission has power to revoke this rule entirely, it has the right to take the far less drastic step of adjusting its effective date to insure fundamental fairness to all concerned. See also Buckley v. Valeo, 424 U.S. 1, 143 (1976)(unconstitutionally constituted Federal Election Commission can remain in business for 30 days until Congress can act to amend the law).

This case presents a classic example of a situation in which an agency perceived some problems, and rather than asking for public comment and advice in solving them, went off on its own and issued an order far broader than was needed. While it may have been necessary to have made some modifications in the effective date portion of the Phase II rule once the Commission decided not to delete the veto condition as petitioners had requested, the failure to obtain public comment resulted in an order of repeal far broader than necessary to achieve the limited ends which the Commission has offered to justify its decision. Had it obtained public comment, all parties could have been heard and their interests accomodated, while still preserving the right of petitioners to seek judicial review of the veto. This is plainly not a situation where there were "no surprises" or there was "no important issue on which petitioner was not heard." Florida Economic Advisory Council v. Federal Power Commission , 251 F.2d 643, 648, 649 (D.C. Cir. 1957), cert. denied, 356 U.S. 959 (1958). Thus, the absence of comments here was surely an error that substantially affected the agency's decision, and there was no good cause for not seeking them. Accordingly, the repeal of the rule is ineffective because of FERC's failure to comply with the notice and comment requirements of 5 U.S.C. § 553.

II. SECTION 202(c) IS SEVERABLE FROM THE REMAINDER OF THE INCREMENTAL PRICING PROVISIONS, BUT EVEN IF IT IS NOT, THIS PROCEEDING IS NOT MOOT.

Respondents also contend that the veto provision in section 202(c) is not severable from the rest of the Phase II provisions, and hence even if the veto were declared to be unconstitutional, petitioners would not benefit from the ruling. Therefore, they suggest, the petition should be dismissed as moot.[4]

There are two basic reasons, set forth more fully below, why that contention should be rejected. First, the veto is severable because the structure and history of the NGPA establish that Congress would have included the Phase II requirement without the veto if it had known that the veto were unconstitutional. Second, if the veto is not severable and brings other sections down with it, not only does Phase II fall, but so do both Titles I and II. In that case petitioners would still be better off than with the vetoed incremental pricing rule since the Commission would then be obligated under the pre-1978 Natural Gas Act, 15 U.S.C. §§ 717 et seq., to reimpose price controls on what is now largely decontrolled new natural gas, since those provisions still apply except where superseded by the NGPA.

Respondents, as well as the United States as amicus supporting petitioners, have adequately stated the law of severability, the essence of which requires the Court to divine what Congress would have done if it knew when it wrote section 202(c) that it was unconstitutional. See Chadha v. INS, supra, 643 F.2d at 415-17, where a similar claim of lack of severability of a one House veto was rejected. The cases cited finding against severability, and the characterizations of them by respondents, are of little help since the outcome almost always turns on the court's assessment of the overall structure of the statute and its legislative history. The case which seems most helpful is Buckley v. Valeo, supra, 424 U.S. at 108-109, where the Court sustained a number, and struck down a number, of interrelated provisions of the Federal Election Act Amendments of 1974, including one which established the method of selection of the members of the Federal Election Commission, who were essential to the entire enforcement scheme. Petitioners submit that, if the Supreme Court was willing to find severability under those circumstances, its statement that severability is presumed " . . . unless it is evident . . ." that Congress intended the contrary, makes it clear that there is a very heavy burden on respondents here.

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[4] There is some dispute about the scope of the non-severable portions of the NGPA among those opposing petitioners. The Process Gas Group argues that all of Title II must fall (Br. 36), whereas FERC (Br. 19), the AGA (Br. 13), and Petrochemical (Br. 9 n.8) urge that only section 202 falls with the veto. That is apparently the position of the Congressional amici although they are not explicit on this point. (Br. 23-28).

It is important to keep in mind the precise nature of the inquiry into the legislative history before undertaking a review of it. The question before the Court is not whether Congress wanted the legislative veto provision included: obviously it did or else it would never have put it in. That almost self-evident conclusion has particular force here where the veto adds to the powers of its Congressional authors. Therefore, the Court should view with particular caution statements by individual members regarding the veto's desirability. The proper inquiry, we submit, should focus on the question of what Congress would have done if it had known that it could not have a veto provision, an inquiry that unavoidably requires some speculation on the Court's part. Despite the difficulties involved, it is a task that must be undertaken based on the NGPA and its history.

Not surprisingly, there is nothing in the NGPA or in its history that indicates that Congress considered the question.

But the history does reveal one surprising fact. Despite the preparation of a detailed Conference Report and a debate spanning nine days in the Senate and two in the House, there is precious little that even refers to the veto, and nothing which indicates that the fate of the incremental pricing provisions was irrevocably tied to it. Thus, in the Senate, respondents have been able to find only a single colloquy between Senators Percy and Jackson (that was reprinted once later on) to indicate even an awareness of the veto. Similarly, in the House, Representative Dingell's comment that merely recognized the existence of the veto is far more important for what it does not say -- that the veto is a crucial element in the compromise -- than what it does say -- that there is a veto which can be exercised before Phase II goes into effect. And the Conference Report, which is the only statement to which more than one or two members subscribed, omitted any reference to the veto in the summary and simply noted its existence in the section-by-section analysis. S. Rep. No. 95-1126, supra, at 95-97, reprinted in 1978 U.S. Code Cong. & Admin. News 9011-13. This omission is particularly striking since neither the Senate nor the House had included a veto in their own prior versions of the incremental pricing sections. Thus, if Congress felt strongly about the veto being central to the NGPA, it never said so or even hinted at it.

In fact, the discussion in the Conference Report focused on another point: whether the incremental pricing provisions, of which the veto was one small part, were a sufficient tradeoff for the phased deregulation of new natural gas. As our opening brief detailed (pp. 3-10), that debate was at the heart of the controversy from the moment the 95th Congress began consideration of the President's natural gas proposals in April 1977, through the floor debates on the Conference Report. The two Houses, which were initially so far apart, were finally able to reach agreement after a ten month conference only because the incremental pricing provisions made deregulation more palatable to homeowners and other high priority users who needed natural gas but could not absorb the shock of sudden, rapid price increases. While undoubtedly the conferees preferred to retain a veto power over Phase II, there is no indication anywhere in the history of the NGPA that they considered the veto to be essential to the compromise.

To the contrary, if the Court is persuaded that the veto was central to the agreement to include Phase II, the conclusion seems inevitable that Phase II was equally essential to the incremental pricing provisions of Title II and that Title II was essential to Title I. Thus, once the veto is found to be inseparable from Phase II, the remainder of the pricing provisions of the NGPA fall with it like a house of cards. A fair reading of the legislative history as a whole compels the conclusion that the "compromise" which was mentioned by every member who spoke, whether he was for or against it, included a full set of incremental pricing rules, not simply the preliminary ones for boiler fuel in Phase I. Indeed, so far as petitioners have been able to determine, no one even suggested that Phase I alone would be satisfactory to protect the consumer.5/ Thus, full incremental

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5/ In the preamble to its Phase II rule, FERC found that Phase I covered only 7% to 8% of interstate volume (App. B 25), hardly sufficient to achieve the desired results.

pricing was the "quid" for which phased deregulation of new gas was the "quo," and both of them were essential to the compromise which became the NGPA. In short, without Phase II, all of the pricing provisions which relaxed the existing requirements of the Natural Gas Act must be set aside also.

The fact that all of these pricing provisions would fall along with Phase II is important to petitioners since respondents have argued that unless the veto is severable, petitioners would not benefit regardless of the outcome of the constitutional issue. That is simply not the case since if all of them fall, FERC will be required to carry out the price control obligations that it has under the Natural Gas Act. That law applies to all natural gas subject to its jurisdiction, and in the 1978 NGPA Congress merely excluded from its coverage "new natural gas," which included principally gas which was discovered after February 19, 1977. See sections 2(3), 2(18), 102-104 of the NGPA, 15 U.S.C. §§ 3301(3), 3301(18), 3312-14. The NGPA does not explicitly amend or repeal the Natural Gas Act, but sets up a separate regulatory scheme by which the price of new gas is set. Id. and section 601, 15 U.S.C. § 3431. If that new pricing mechanism falls, the pricing will perforce revert to the still extant Natural Gas Act, under which the controls are far more stringent and hence even more beneficial to consumers than is Phase II. In fact, the price policy existing under the pre-1978 law was cited as a principal reason for the need for decontrol which was partially accomplished by the NGPA. See e.g., 124 Cong. Rec. S14869 (Col. 1)(September 11, 1978)(remarks of Senator Jackson); 124 Cong. Rec. H13114 (Col. 1)(October 14, 1978)(remarks of Cong. Dingell). While it may not be possible to quantify precisely the comparative benefits under Phase II incremental pricing as opposed to price controls under the Natural Gas Act, it is apparent that petitioners would be better off under either than under Phase I alone. Therefore, petitioners plainly have a sufficient stake in the outcome of this proceeding to require the Court to decide the constitutionality of the one-House veto in section 202(c).

III. THIS COURT IS THE PROPER FORUM TO DECIDE THIS CONTROVERSY.

The third argument offered to avoid deciding the merits of the one-House veto issue is raised solely by the Congressional amici. In a motion filed at the same time as their brief, amici contend that this Court lacks jurisdiction since this proceeding belongs in a district court, not a court of appeals. Petitioners advised the Court that they would answer the jurisdictional claim in this reply.

In the interim, FERC has responded to the suggestion that jurisdiction is lacking with a memorandum urging the Court to hear this case, a view which is obviously entitled to great weight. Furthermore, we note that these same amici unsuccessfully sought to persuade the Ninth Circuit in Chadha v. INS, supra, that the challenge to that veto belonged in the district court, although the rationale presented there was somewhat different from that argued here. See 634 F.2d at 411-15.

The key to amici's claim of lack of jurisdiction is their characterization of this proceeding. Because it is so central, it bears quoting in full:

> Under section 506 of the NGPA, 15 U.S.C. § 3416, this Court has jurisdiction to review FERC orders and rules issued under the Act, but petitioners do not seek review of either an adjudicative order, or a rule. They instead challenge FERC's acknowledgement that by operation of law its proposed rule is not effective. In essence, petitioners seek to compel FERC to adopt the incremental pricing rule which the House of Representatives has rejected. The decision of an agency not to adopt a rule can be challenged only by an action for mandamus and similar means in the district court, not this Court, and this petition for review should be dismissed. (Memorandum pp. 2-3, footnote omitted).

This argument depends on the assumption that what petitioners seek to overturn is the decision of FERC "not to adopt the incremental pricing rule which the House of Representatives has rejected" since the two authorities principally relied on -- Natural Resources Defense Council v. Securities and Exchange Commission, 606 F.2d 1031 (D.C. Cir. 1979), and Environmental Defense Fund v. Environmental Protection Agency [PCBs], 598 F.2d 62 (D.C. Cir. 1978), are relevant only in that context. However, a proper analysis of the proceedings below makes clear that amici have miscast what has occurred to fit their jurisdictional theory.[6/]

On May 6, 1980, the Commission issued its Phase II rule, and two weeks later the House of Representatives vetoed it. On

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6/ The decision in Association of National Advertisers v. Federal Trade Commission, 617 F.2d 611 (D.C. Cir. 1979), is also inapposite since it deals with an attempt to challenge an incompleted rulemaking proceeding. Similarly, Clark v. Valeo, 559 F.2d 642 (D.C. Cir.)(en banc), aff'd mem. sub nom. Kimmet v. Clark, 431 U.S. 950 (1977), has no bearing since the Court there merely refused to consider a challenge to an unexercised legislative veto power, precisely the opposite of what is involved here.

June 4, petitioners filed their mandatory petition for rehearing asking the agency to delete that portion of the rule which conditioned its effectiveness on the failure of either House of Congress to veto it. That objection was in all material respects the same as one which petitioners might have filed if FERC had postponed the rule's effective date indefinitely instead of putting it into effect immediately, and should be treated the same for judicial review purposes. Similarly, if petitioners' request here had been granted, industry undoubtedly would have sought judicial review and would have filed their petitions in a court of appeals. We submit that there is no reason to believe that Congress would have intended some, but not all, of these cases, all based on challenges to effective date provisions, to be heard in a court of appeals, yet that is what *amici*'s theory requires.

In fact, FERC decided not only to deny rehearing, but to revoke the Phase II rule as well. Since petitioners are also objecting to that revocation, it is difficult to understand how *amici* can contend that this case does "not seek judicial review of either an adjudicative order, or a rule." Memorandum pp. 2-3. Since the issue of the validity of the revocation is part and parcel of the case challenging the veto, it seems incredible to suggest that they should be heard in two different courts, yet that is the logic of *amici*'s position. Similarly, the petition for rehearing and the second petition for review in this Court, while not clearly necessary, both were also part of the same basic matter and are also properly in this Court.

After the veto, petitioners concluded that they would benefit from the vetoed Phase II rule and that the veto was unconstitutional. To test the legality of the portion of the rule to which they objected -- that which conditioned the rule's effectiveness on the absence of a veto -- they petitioned for rehearing and then sought judicial review in this Court. *Amici*'s efforts to relabel this challenge, and their assertion (Memorandum, p. 5) that it is "completely external to the agency rulemaking proceeding," are simply mistaken. Because their jurisdictional argument is based entirely on their own erroneous description of this proceeding, it cannot stand.

Finally, *amici* suggest that a district court is the more appropriate forum to hear this case because it is more flexible and better suited to take evidence on the constitutional issue. In the first place, those kinds of policy arguments are irrelevant since the proper court for a given proceeding is a matter on which Congress, not the courts, exercises final decisional authority. Congress has already spoken in 15 U.S.C. § 3416(b) in which it provided that "judicial review of any rule or order, within the meaning of section 551(4) of Title V, issued under this chapter may be obtained in the United States Court of Appeals for any appropriate circuit . . . ." There is no basis to second guess Congress on what it meant by that broad provision, nor to believe that the agency which is charged with operating under this provision has misinterpreted it.[7/]

7/ Congress might have provided a special judicial review procedure for the veto provision in section 202(c) as it did in the vetoes for the FTC and EPA cited by *amici* at n.* on page 7 of their Memorandum. It should be noted that neither statute (footnote continued)

Even if this Court might properly weigh the factors suggested by amici, they do not counsel in favor of having the case decided by a district judge. As for testimony, assuming it is relevant, the record of the House hearings on Phase II, the Commerce Committee Report, and the floor debate (all cited by amici), give a full picture of the reasons why the House exercised the veto. Surely, amici do not contemplate depositions or a trial with live witnesses, given the comprehensive "administrative record" already assembled.

As far as flexibility is concerned, section 3416(a)(4) gives the Court the power to issue an order "affirming, modifying or setting aside, in whole or in part, such an order of the Commission . . .." Together with the authority contained in 28 U.S.C. § 2106, which allows a court of appeals, inter alia, to "require such further proceedings to be had as may be just under the circumstances," there is more than ample flexibility to handle any problems which may arise. In sum, there is no reason for this constitutional challenge to be in a district court, and a number of good reasons why this momentous issue, to which we now turn, should not be decided by a single district judge.[8]

(footnote continued:)
allows a single district judge to decide the constitutional issue, but instead requires the case to be certified to the court of appeals to hear it en banc. Thus, those provisions plainly do not support amici's claim that district courts should decide that issue. Indeed, their existence suggests that in their absence, the normal judicial review procedures would have been followed, with the case going directly to a court of appeals. Finally, in the case of the FTC the law seems to allow pre-veto challenges and also limits the special procedures to this Circuit.

[8] Presumably, if this case belonged in a district court, there would have been no need for petitioners to seek rehearing, which would have been violative of another Congressional policy. See
(footnote continued)

IV. THE VETO BY THE HOUSE OF REPRESENTATIVES IS UNCONSTITUTIONAL.

The defense of the veto made by the Congressional amici contains a number of points regarding separation of powers, the differences between executive and independent agencies, the differences between rulemaking and other kinds of agency action, and the relationship between legislation and rulemaking. They all, however, relate to several fundamental principles.

First, Congress has determined the veto to be necessary, and the courts should not substitute their judgment for that of Congress on the issue of necessity. Petitioners do not disagree; whether the veto is "proper" under the Constitution is another matter.

Second, what Congress did in vetoing the Phase II rule was legislative in character and represented a policy judgment that Phase II should not go into effect (Cong. Br. 43-47, especially n. 41 and 55 n.51). Petitioners do not disagree with this interpretation of the particular veto, although as they pointed out in their principal brief, there were elements in the veto disapproval debate that focused on allegedly erroneous interpretations of the NGPA and criticisms of the methods chosen by the agency to carry out Phase II. (Br. 32-34). Thus, we agree that on balance, this veto arose principally because the House changed its mind about the advisability of Phase II.

Finally, although only one House approved the veto, and

(footnote continued from p. 28)
ECEE v. FERC, supra. In addition, the 60 day time limit for filing for judicial review contained in 15 U.S.C. § 3416(a)(4) would also not apply.

although the President was not afforded an opportunity to participate in the veto decision, this "legislative" veto is nonetheless permitted by the Constitution. It is on this question that petitioners part company with Congress. As amici recognize in their citation to McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)(Br. 34), a statute must employ means "which are not prohibited, but consistent with the letter and spirit of the Constitution . . . ." See also Buckley v. Valeo, supra, 424 U.S. at 134-140. However, for the reasons set forth below, even if Congress decides that the veto is "necessary" under the "necessary and proper" clause, it is not "proper" and thus is unconstitutional.[9]

Congress' defense of the veto contains two parts. First, amici argue that the veto is not legislation, since it neither repealed nor changed the law, and hence it need not meet the constitutional standards for legislation which include passage by both Houses and presentment to the President. Second, and equally necessary to sustain their argument, amici contend that as something less than legislation, the veto falls within the powers traditionally recognized as exercisable by one House, and thus is "proper" under the Constitution. It is the position of petitioners that the effort to characterize the veto as something less than legislation cannot stand because it fails to accurately reflect the entire statutory scheme regarding the rule that FERC issued to implement Phase II. The latter proposition -- that as

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[9] Amici suggest that the issue presents a political question which is best left to the other branches. (Br. 50-53). That same argument was decisively rejected in Chadha v. INS, supra, 634 F.2d at 419: "It would stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle."

"non-legislation" the veto is still constitutional despite its substantial effect on the public -- cannot be sustained because it is inconsistent with specific provisions of the Constitution and finds no support in any judicial decision.

On the question of whether the veto is "legislation," the essence of amici's position is that the May 6 rule was no more than a proposal from an executive agency to the Congress which could be rejected, like any other proposal, with no constitutional ramifications. Under this view there was no change in the law when the proposal was rejected. According to amici's argument, it is as if FERC had sent a proposal to Congress to repeal section 202 entirely, and Congress had failed to act on it, or the House had voted it down. Joined by the AGA (Br. 33-62), they argue that no constitutional issue would arise in that case, and we agree. However, the difficulty with analogizing the veto to a rejection of a proposal arises from ascribing the term "proposal" to a rule sent forth by the Commission which, if not rejected, will go into effect without affirmative Congressional approval.

Thus, consider the situation which would have existed if Congress had not vetoed this Phase II rule. In that event, according to the analysis of amici, there would have been a change in the law when the rule became effective, yet nothing would have been done by either House or the President. But surely, inaction by Congress and the President cannot result in the enactment of a law under our constitutional system because the passage of time alone cannot turn a proposal into a law. As the Ninth Circuit observed in Chadha v. INS, supra, 634 F.2d at 435, "a mere executive recommendation . . . followed by legislative inaction . . ." does not enact a law. Therefore, it is inaccurate to describe the May 6 rule as a proposal because it does not take into account that Phase II would have become law solely by the passage of time if there had been no veto. If the May 6 rule is more than a proposal when there is no veto, surely it cannot be just a proposal merely because Congress subsequently decided to veto it.

It is for that reason that the Congressional *amici* are incorrect when they say there has been no "repeal" or "change" in the law by operation of the veto here (Br. 22, 63-66). Since the veto operated to change or repeal the law, it is legislative in character and must be enacted in accordance with the Constitution, which requires the same concurrence of both Houses and presentation to the President as the NGPA did. Since that has not occurred here, the veto is unconstitutional as an unauthorized form of legislation.

Even assuming that the veto here involves a kind of Congressional action short of legislation, it is still unconstitutional for two separate, independent reasons: it violates both the Presentment Clause and the principle of bicameralism. In our opening brief (46-54), we discussed the breadth of the Presentment Clause under which the Framers intended to bring for presidential consideration every matter of substance, excluding only internal Congressional house-keeping matters. Thus, even if the veto is not a bill within the meaning of Article I, section 7, clause 2, it still falls within the larger ambit of matters covered by Article I, section 7, clause 3, which the President must have an opportunity to veto after both Houses approve it.[10]

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[10] The assertion at p. 54 n.50 of *amici*'s brief, that it would be (footnote continued)

In support of their view that a one-House veto is a constitutional device for taking action having the substantial i that the veto had here, amici cite four categories of activi (Br. 57-61), none of which is applicable to this case. The example involves the statutes in which one House of Congress authorized to direct an agency to conduct an investigation. a direction, which is taken in aid of a legislative functio merely shifts the co-extensive authority to investigate fro legislative to the executive branch. More importantly, it not purport to effect a change in law or to stop any law, r or order from going into effect. While the outcome or eve conduct of the investigation may have some impact upon per side the government, it is nothing remotely similar to the that the veto had here. Thus, whatever the constitutional that practice may be -- and there are no authoritative det sustaining it -- it would not support the veto in this ca any event.

Second, Congress cites the reorganization statutes w back to the 1930's and points to an opinion by former Att General Griffin Bell who supported the Reorganization Ac which included a veto provision. In assessing the impac that opinion, it cannot be overlooked that it was issued President who very much sought to have the reorganizatio and who fully recognized the political realities that wi mechanism for congressional disapproval, his only optio

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(footnote continued from p. 32) "redundant" to discuss both provisions of the Presentme is erroneous insofar as it suggests that the second pr nothing to the first. See Petitioners'Brief at 46-49.

to go through the full legislative process. Moreover, the impact of reorganization is principally, although not entirely, on the operation of the government itself, and hence even if the veto were to be held lawful in the context of reorganization authority, it would not be a basis for the kind of lawmaking, or law-unmaking, that the veto in this case involves.

Third, amici cite the statutes involving foreign affairs which have contained vetoes, generally of the two-House variety. While two-House vetoes do respect the bicameral nature of our legislative process, there are again no determinations that those vetoes are lawful, and past practice alone does not establish their constitutionality. Moreover, as with the two prior examples, each case must be considered on the basis of the specific statutory scheme at issue, the source of the executive's power, and the manner in which Congress has sought to exercise its power. Thus, regardless of how those cases might be decided, this one must be judged on its own merits.

Finally, the fourth example -- that of the constitutional amendment which does not require presidential consideration -- is hardly support for position for amici. In that situation the Supreme Court has interpreted the Constitution to include an exception to the Presentment Clause in the provision regarding constitutional amendments. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). If anything, the existence of a specific exception to the Presentment Clause, which is obviously inapplicable to the veto at issue here, supports petitioners rather than amici.

But even if somehow Congress can avoid the Presentment Clause, the veto still must fall since as the action of a single House it violates the fundamental principle of bicameralism embodied in our Constitution. As our prior brief demonstrated (54-58), the principle is not dependent upon the legislative character of the action. In our view, the action of a single House may affect the public only with the concurrence of the other House (and generally presentment to the President). It is only when dealing with its own affairs, a situation plainly not present here, that either House of Congress may act unilaterally. It is important to note that, although amici have not responded separately to this argument, it is not simply another aspect of the Presentment Clause point. Rather it is an independent legal basis upon which this veto should be declared unconstitutional.

Similarly, amici make no response to petitioners' further separate argument that the veto must fall as an undue delegation of legislative authority. It is true that the doctrine does not apply to Congress when it enacts legislation in accordance with the procedures set forth in the Constitution. However, contrary to the assertion made by amici, it is not "Congress" that acted to veto the rule here (Br. 21, 47), but a single House of Congress. Moreover, the fact that the undue delegation argument is inapplicable to legislation does not support the veto because "the internal check of bicameralism" was lacking (Chadha v. INS, supra, 634 F.2d at 433), and there was no involvement of the President. As we noted in our earlier brief (60-62), there are no standards under which the veto can or cannot be issued, and there is no judicial review to determine whether the veto was properly exercised.

These factors also demonstrate that the argument of Congress used to support the veto is an argument without limitation. Thus, if this veto is sustainable, so is one which would provide comparable authority to a single committee, subcommittee, an individual chairman of a committee or subcommittee, or perhaps even the Speaker of the House of Representatives or the Majority Leader of the Senate. In other words, once Congress departs from the constitutional framework for legislative activities, there is no end to the process by which it might delegate standardless legislative authority to either House or any part of it. Such a result violates fundamental principles of checks and balances and in essence would permit Congress to combine in a single unit executive, legislative, and judicial functions, whenever it thought it was "necessary" to do so. The Constitution permits no such delegation, and the veto should also be stricken down for that reason as well.[11]

There are two other points made by amici to which a brief response seems appropriate. First, they note that FERC is an independent agency and not simply part of the executive branch. In our view, the fact that FERC is an independent agency is not relevant to the issue before this Court, where the focus is on what Congress did rather than on the kind of agency over which it exercised the veto. Indeed, the whole notion of independence relates to the role of the President, i.e., whether the President can fire the head or members of the agency at will, and not to whether

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[11] The fact that a President and both Houses signed the original legislation embodying this veto in 1978 cannot, as amici suggest (Br. 22, 61), act as a sufficient compliance with the Constitution to obviate problems set forth above. Indeed, if that argument were accepted, there would be no basis for any claim of undue delegation since in every case the original law containing the delegation was enacted in accordance with the constitutional framework.

Congress can control the agency to a greater or lesser extent.

The irrelevance of the independence of FERC is highlighted here because the action by the House was legislative in character. Thus, the fact that Congress assigned the responsibility to issue the Phase II rule to FERC, rather than an executive agency such as the Department of Energy, makes no difference when Congress gave either House the power, in effect, to overturn the rule legislatively. Similarly, considerations of separation of powers, undue delegation, and bicameralism all pertain equally when Congress is performing a legislative function, regardless of whether the law that it is amending is applicable to an executive or independent agency. Indeed, it could be argued that the need for the presentation to the President is even greater for independent agencies, since the President cannot control their action in a rulemaking context.

Finally, Congress' argument is directly refuted by Buckley v. Valeo, supra, 424 U.S. at 140, in which the Court held that the members of the Federal Election Commission had been unconstitutionally selected because of the Congressional role in their appointment. While it is true that the decision did not, as amici state (Br. 41 n.37), "limit Congress' authority to determine the functions of independent agencies in such contexts as this case," it did establish that independent agencies are subject to the same constraints as executive agencies where there are specific constitutional prohibitions involved, as there are here.

Finally, throughout their brief, amici urge the Court to recognize that the concept of separation of powers is a flexible one, and they suggest that there are many difficult questions involved in defining its reach. Petitioners do not disagree with the assertion that the Constitution must necessarily contain flexibility, nor do they dispute that there are many hard questions involving separation of powers. This, however, is not one of those cases that calls for the application of the doctrine of flexibility or presents difficult questions at the periphery. What is involved here is a frontal assault by Congress, using extra-constitutional procedures, on the capacity of the executive branch to carry out the laws. What Congress has sought to do is to preserve for itself the authority to amend legislation, to interpret legislation, and to carry out legislation in the manner it sees fit through the device of a one-House veto. To do so violates fundamental principles of separation of powers, as well as the specific doctrines contained in the bicameral provisions of the Constitution, the Presentment Clause, and the principles of undue delegation. Because the veto transgresses all of these, it must be set aside.

CONCLUSION

For the foregoing reasons and those set forth in our prior brief, the decision of the Commission should be reversed, and the case remanded for further proceedings in which the veto of May 20, 1980, is to be disregarded.

Respectfully submitted,

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May 26, 1981

Mr. Moakley. Our final witness, and we thank him for being so patient, is Prof. Antonin Scalia, consultant, Coordinating Group on Regulatory Reform, American Bar Association.

Thank you for coming back to testify before our committee.

STATEMENT OF PROF. ANTONIN SCALIA, CONSULTANT, COORDINATING GROUP ON REGULATORY REFORM, AMERICAN BAR ASSOCIATION

Mr. Scalia. Thank you very much.

As you know, it is a subject I am personally interested in and the Bar Association is interested in, so we are delighted to be able to share our thoughts with you.

My name is Antonin Scalia, professor at the University of Chicago Law School. I am chairman of the American Bar Association's section of administrative law.

More to the point for present purposes, I am consultant to its coordinating group on regulatory reform, which is a group composed of representatives of the sections of the association that are particularly interested in the subject of regulatory reform.

The chairman of the coordinating group is Richard Smith of New York who intended to be here and unfortunately was prevented by a death in the family. He asked me to give my apologies to the committee for his inability to appear.

The principal statement that I want to call to your attention is action taken by the house of delegates of the American Bar Association, which is no enemy of regulatory reform.

In 1979, the house of delegates adopted the recommendation of its commission on law and the economy, which included the statement that the association, and I quote, "Opposes the indiscriminate application of any form of legislative veto to all States delegating regulatory authority to independent and executive branch agencies."

So, the bar is, through its house of delegates, not just one of its sections, on record in opposition to an across-the-board legislative veto.

I will discuss some of the reasons for that opposition.

In my statement I will say relatively little, in fact almost nothing, about the constitutional aspects.

Perhaps we can get into that in whatever time we have left for questions and answers afterward. But, mainly, I want to call attention to the practical aspects of the matter and how it impinges upon the success or failure of regulatory reform.

Those of us who have been laboring in the vineyard of regulatory reform, even those of us of that description who oppose the legislative veto, nonetheless have what might be called a sentimental attachment to the legislative veto.

It has, of course, great psychological appeal. As a forceful demonstration of congressional determination, never mind how effective that determination may be, congressional determination is to bring the agencies under control.

Ardent proponents of the legislative veto, including my friend, Congressman Levitas, whom I have debated the subject with many times, were, it must be admitted, among the first to note the fact that the agencies were regarded as being out of control and to bring that to the attention of the rest of us.

But the fact is that in the major efforts toward regulatory reform that Congress has taken in the past few years, the debate has gone well beyond the legislative veto. Much more effective means of range in the agencies have been proposed and discussed, such as the requirement for regulatory analysis, stricter standards of judicial review and greater involvement of the executive to provide the necessary Government-wide overview of narrow agency decisions.

All these devices are in our view both constitutionally preferable and pragmatically more effective.

The fact is that, however useful the veto may have been as a device to galvanize regulatory reform sentiment, we have now gone beyond it.

What I have called our sentimental attachment should not be permitted to distort our judgment that there are better means available.

The legislative veto is both ineffective in what it seeks to achieve and destructive of other values that the other regulatory reform measures I have alluded to seek to further.

First of all, it is ineffective. It is ineffective in theory. What is it meant to achieve other than a symbolic manifestation of congressional concern? What does it achieve that could not be achieved through the normal processes of legislation?

I suggest there are only three things:

No. 1, the few days it would take for legislation to rest upon the President's desk, and if he does not sign it, to return it to the Congress and have the Congress override his veto; it saves that time.

No. 2, it avoids the Presidential veto.

No. 3, in the case of a one-House veto, it avoids the necessary agreement of the other House.

I am unable to see anything else that it does beyond what normal legislation can do.

So, it seems to me you must ask yourself: Is any one of those three things the problem? Is that why you have not been able to bring the agencies under control? Has it been that there has been a time delay, is that what concerns you, the time delay of sending it over for Presidential approval?

I think not. Has it been that the President has vetoed with any regulatory or indeed at all efforts by the Congress to strike down particular rules?

I am unaware that that is the problem. Has it been that one House recurrently wants to reign in the agencies and the other House disapproves?

I am unaware that that is the problem.

Now, if I am correct in all of that, then it seems to me the legislative veto is a solution in search of a problem.

It does, indeed, have that great psychological effect, but what does it achieve that needs to be achieved?

The real problem is not that congressional action has been frustrated by the President or by the other House or by the delay in getting Presidential approval, but the real problem is that, by and large, Congress has not had the time to review agency regulations.

That will not at all be solved by the legislative veto.

The real problem is also that narrow, single interest—the narrow single interest focus applied by each individual agency is never tempered by a broader Government-wide perspective.

So, that the agency that is concerned with the environment pursues that end to the disregard of other concerns such as employment.

Or another agency that is concerned with another aspect, another narrow aspect of our national life disregards the effects of its actions upon the rest.

But again, the legislative veto does nothing to solve this. The veto is still to be applied through the recommendation of the substantial committee of Congress with oversight responsibility for the agency in question, which, by and large, has the same narrow, single interest focus as the agency itself.

Indeed, it is one of the corners of what political scientists call the iron triangle of regulation; consisting of the agency itself, the constituency of the agency, and the substantive committee of the Congress.

By the way, the bill introduced by Chairman Moakley would solve this problem by having regulations go through a committee that is not a single interest substantive committee, but a committee that does bring to bear the entire national concern and another means that solves the problem contained in some of the regulatory reform legislation you gentlemen are considering is bringing the President into greater involvement in the whole regulatory process because he again brings to it that broader national concern.

But, even in theory the legislative veto does nothing to solve that problem.

Now, things that do not work in theory generally do not work in practice. I think that is why universities stay in business.

The only study I am aware of that really tried to figure out what was the effect of a legislative veto provision was done by Professors Gillhorn and Bruff, published, I believe, in Harvard Law Review and it concluded that the major effect of the legislative veto was, not surprisingly, to augment substantially the power of the congressional staff of the substantive committee which had the task of recommending the veto to the floor, not at all surprising.

The committee members themselves would have no time to review the torrent of regulations that come forth. It would be left to their staff.

So, what I suggest you will be creating, what I suggest you will be doing is solving the problems of one bureaucracy by erecting a second.

I think you will find the net result is hardly a gain.

I always cite one instance as a demonstration of the general ineffectiveness of the legislative veto. It doesn't take much argument. You either agree with it or you don't.

It is the fact that all of the regulations of the Office of Education in what used to be HEW, and now the Department of Education, all of those regulations have been subject to a legislative veto since 1975.

Now, if you are under the impression that those regulations are somehow under greater control, that you are more comfortable with that particular agency, then I suppose the legislative veto is successful.

But I am not under that impression and I don't think most people are. There is as much controversy over some of the regulations that came out of OE as any other agency; indeed, perhaps more.

What I have said indicates that the legislative veto will be, in my opinion, ineffective.

But, worse than that, as I suggested earlier, it will be destructive of the genuine values that are sought to be served by the other regulatory reform proposals you have before you.

Those proposals include a requirement for regulatory impact analysis that must be done by the agency. They include a requirement for new rulemaking procedures that include in certain circumstances cross-examination and a more or less closed record on the basis of which the agency has to make its decision.

They include, third, stricter judicial review to keep the agency within its assigned mandate.

All of these improvements are obviously intended to make rulemaking a more rational, more analytic process.

It is utterly inconsistent with all of this and utterly destructive of it to add on at the end of that process, indeed, not at the end, but rather in the middle of it, between the agency action and the stage of judicial review, a process that is not analytical, but is quintessentially political.

I don't mean that as a criticism. I mean it will be quintessentially political; that is what Congress is here for.

But it seems utterly irrational to, on the one hand, try to make the rulemaking processes more analytical and on the other hand chuck into the middle of it an element that is utterly unanalytic and entirely political.

Congress will not limit itself to the rulemaking record when reviewing these rules, nor will the congressional comments or even the comments of congressional staff to the agency before the rule is adopted, be inserted into the rulemaking record, the negotiations going on between the agency and congressional staffs to be sure they come up with a rule that won't be vetoed.

I suggest all of that will be enormously destructive of what you and the American Bar Association have been eager to achieve in this process of regulatory reform, all, as I suggest, because of a sentimental attachment to the legislative veto.

In short, I think the legislative veto has the potential and I think the certainty of destroying the very important regulatory reform initiatives now underway in the Congress.

It is primarily for that reason, although also for reasons of constitutional questionability, that the American Bar Association opposes it.

Thank you very much.

Mr. MOAKLEY. Thank you very much, Professor Scalia.

John?

Mr. RHODES. It seems you have just indicted the legislative processes very effectively.

We don't have enough sense to look and see whether the agency understands the laws and we are supposed to let the courts do that.

I am sorry to see the contempt you have for the legislative process.

Mr. **Scalia**. You mistake. It is not meant to be contempt at all. I have a great respect for the Congress.

When I use the word "political," it is not a dirty word for me. What Congress is here for is to make political judgments of our society. That is the most important thing. It is more important than all of the analysis.

Mr. **Rhodes**. Well, I disagree with that too. I don't know how you define political, but there are a lot of decisions made here that aren't based on any kind of what I would call politics; they are based on what we happen to think is the best interests of the country. If that is political, why I guess that is true.

Mr. **Scalia**. Well, that is all that I mean by political. Those interests, as they are expressed to you by your constituents.

Mr. **Rhodes**. What makes you think that the decisions we make would be different than the decisions that a court would make?

Mr. **Scalia**. Because that is not the test for a court; what do the people want. That is simply not the test the court applies, nor is it supposed to be the test that an agency applies. That is why when you suggested earlier that somehow the legitimacy of the legislative veto might hinge upon the reason for which the veto was exercised, I could not go along with you on that.

It seems highly unlikely that a present Congress is going to seriously enter into a determiation of what the intent of an earlier statute was.

I find it fantastic that our representatives, even though many of them are lawyers, should waste their time flipping through legislative history, trying to figure out what during the era of Lyndon Johnson the Congress that passed this particular statute meant.

I doubt whether they would do that. I would not want them to do that.

Rather, what they will do is express what the Congress today wants, but that is not interpreting old legislation; that is making new legislation, and it is precisely for that reason that I see the legislative veto as being simply inconsistent with the rule of law, if you will.

The Congress is changing the law as it goes along.

Mr. **Rhodes**. I think we should all freely admit that one of the reasons that the legislative veto looks good to some of us is that we have some institutional defects in this Congress; we haven't been able to cope with it any other way.

One of the institutional defects you pointed out very well was the triangle, the fact that the people who ought to be most concerned about whether a regulation is actually in accordance with the intent of Congress, the committee that has jurisdiction, has long since entered into an incestuous relationship with the agency and doesn't really perform that function.

I think what legislative veto would be, if it were applied—and I think it would be very rarely applied because probably no regulations would receive that kind of scrutiny except some of the very important ones, but if it were applied, it would be I think on the basis that the Congress, or the majority of the Congress is actually trying to discipline its own committee in many ways.

That is what the reconciliation process actually did.

You know, I sat on the floor, in fact I think in here when we had the reconciliation bill. I hope we never do this again. It was a Draconian method that was applicable and desirable only because we didn't have a better way to do it, and maybe that is one reason this looks good. I don't know.

Mr. **Scalia**. But why would a legislative veto be forced out of the committee more easily than a proposal for legislation be forced out of the committee?

I don't know how calling it a legislative veto instead of the bill helps you to jerk it loose from the committee any more easily.

It seems to me that to solve the problem of the iron triangle, what you could simply do is to provide that any—it is a matter of changing your own house rules.

It seems you could provide that any proposal for legislation overturning an agency rule shall come immediately to the floor and be voted upon under certain quiet time restricted procedures.

Now, that would be solving the problem that I see exists, but I don't see how the legislative veto does.

Mr. **Moakley**. Professor Scalia, one problem is that all our time on the floor of the House would be taken up with legislative vetoes. That is one of the reasons many of us are opposed to the legislative veto because it might take up to 10 hours out of our legislative day.

The other day the D.C. sex bill was considered under a formal legislative veto. It put everything else on the back burner. We spent 5 hours but accomplished nothing.

Mr. **Scalia**. I agree that raises another problem. At least it solves the first one in the course of creating the second one, but the proposal for legislative veto it seems to me does nothing except perhaps gives one a warm feeling inside, "By God, we are getting control of these runaway bureaucrats."

Mr. **Moakley**. Once again I am glad to have you before the committee for your second appearance. I always enjoy your presentations. The legislative veto doesn't give, as you say, anybody the chance to interact with the agency. It doesn't give Congress the opportunity to make suggestions for improvement in the rule to the agency.

It is a Draconian approach, a guillotine, yes or no, that's it. There is no input.

I think that one thing you haven't considered, John, is that if you veto a regulation, there is no going back; the agency must go back to square one.

Mr. **Rhodes**. Of course, one of the reasons that I look with some favor—I have to say I am not really sold on legislative veto, but one of the reasons I look with some favor on it, I do think there would be that interaction between the committee staffs and agency staffs to prevent a legislative veto.

I see nothing wrong with that. If a regulation were cleared in advance with the legislative committee, I think that is good. I have always strived for that.

Mr. **Moakley**. So you would view it as a "carrot and stick" approach, the agency would know somebody is up here watching them.

Mr. **Rhodes**. Hopefully it would be rarely used.

Mr. **Scalia**. There is somebody up there watching them, but the person watching them is the fox. "We have met the enemy and he is us."

Mr. **Moakley**. That's the reason this legislation was proposed in the first place.

Mr. **Scalia**. That is right. My impression is not that agencies go skipping off pointing their nose at substantive committees. It isn't the substantive committee by and large that is upset with what an agency is doing; from my service in the Government, my experience is that the bureaucracy is quite sensitive to pleasing their substantive committee.

But it is the rest of Congress that they are not too concerned about.

Mr. **Moakley**. Mr. Frost?

Mr. **Frost**. No questions.

Mr. **Moakley**. Gene?

Mr. **Taylor**. I think, Professor, one phrase you used there probably sums up the whole problem when you spoke of a "torrent of regulations."

I think this is the problem. As you say, maybe they are amenable to pleasing their committee, but not necessarily anyone else in the Congress. Sometimes they are not amenable to pleasing 217 million Americans, whose lives they are affecting. And they usually disregard the economic cost of this regulatory maze that we find ourselves in is alarming.

I know. I have records of my office replete with complaints from people who have been in business, that, in order to comply with one regulation they have violated another and the bureaucrats come down on them.

What do we do about this?

I think the legislative veto is just—I don't think it is the best system. I think it is the only vehicle to get at these concerns in anything like a timely manner and probably that is the big problem, time. I was interested in your suggestion that maybe we change the House rules, so that if there is going to be an attempt made to veto regulations, it be given priority, be moved ahead.

But, as the chairman said, that would probably create some more roadblocks. The people look to the Congress to do something about the regulatory maze we find ourselves in. That is the pressure we are all under. We have allowed too many regulations to be put into effect, no question about it.

We have tried to protect everybody from everything and we just can't do it. We simply can't do it. Somebody has to look out for themselves.

The Federal Government can't do it all. Sure we are interested in the consumer. The free marketplace is good for the consumer, if we will let it work, let the competition work.

I think the free market is the best consumer protection agency we could probably have, but there are some who don't believe that.

Regulations dealing with unscrupulous operators are important, but mercy sakes, we have thrown the baby out with the bath water, it seems to me.

Mr. **Scalia**. Congressman, believe me, those who know my views on regulation would tell you that I agree entirely with all that you have said.

The only issue is whether the legislative veto helps to solve the problem.

What I am suggesting is that not only won't it help to solve the problem, but it will make it more difficult to solve the problem because the other regulatory reform measures that you are thinking of adopting, which we think are quite effective, can be stymied by the substantive committee through the legislative veto process.

Unless you are going to take the recommendation of the veto out of the substantive committee and give it to someone else, is politically perhaps impracticable.

Every proposal I have seen for the legislative veto sends it through the substantive committee. What that substantive committee will be able to do is prevent the effectiveness of the regulatory reform measures we have imposed upon the agency.

The agency does an EIS and says, "By God, we don't think it is cost effective." the substantive committee says, "Wait a minute. This is our baby here. We like whatever it is."

I am not sure you are helping the situation with a legislative veto.

I would like to, if you would indulge me, speak to one constitutional issue that was not raised by the Justice Department or any of the other speakers here. It is never raised by the Justice Department because it is in a way, well, it is difficult for the Justice Department to talk about it, but mainly it is not the Justice Department's business.

They are the President's lawyer. What they dislike most about the legislative veto is the manner in which it impinges on Presidential authority which I think is true.

But that is not what most concerns me. What most concerns me is the way it impinges upon the power of the people, vis-a-vis not the President or the Congress, but the President and the Congress combined.

There are two sorts of legislative veto provisions; there are some that the Congress sort of hangs on the President's neck.

He really doesn't want it, but has to take it.

The AWACS controversy right now is, I suppose, an example of that.

There is another type, however, in which the President and the Congress get together to, in effect, change the law without the necessity of the Congress ever having to vote upon the change because they know if they have to vote upon the change it is unlikely the change will occur.

I refer specifically to two instances, one is pay raises and the other one is Executive reorganization.

The legislative veto has been used in the past repeatedly as a device to achieve those ends without a congressional vote.

I think if there is any indictment of the constitutionality of the device, that is clearly it. The last time it happened with the pay raise, the pay raise was proposed by President Ford after the election; he had no political capital to lose; it went up to the Congress and the Congress said not a word. And without a word being said, all high-level Executive offerings and the Congress got something like a 30-plus percent pay raise.

Mind you, I think they deserved the pay raise, no quarrel. But it seems to me democracy means that when the law changes the Congress votes on the change. Same with executive reorganization; OMB used to love the legislative veto in that context.

In fact, the Carter administration issued an opinion by its Attorney General that said that is the only context in which we think it is constitutional.

I don't think it is constitutional there or anywhere else. If you want to abolish the agency, or fold the Department of Labor into the Department of Commerce, that is a pretty important matter.

Congress should vote on it, not done by a process whereby so long as Congress says nothing, the law changes. Or to put the matter another way, what Congress does whenever it makes a legislative veto provision is to admit that there is being an unconstitutional delegation of authorities. I am not a fan of the doctrine of unconstitutional delegation.

I think it exists as a constitutional doctrine but not one that can be applied by the courts. It is a constitutional doctrine that the Congress must keep in mind.

I don't think the courts can enforce it. However, there is one instance where the courts can; that is when the Congress passes a measure but says, Well, you know this measure, we really haven't done all we should do on this; we are not sure what it means and it doesn't give a clear enough command to the agency that we are sure the courts can make the agency do what we want them to do, indeed, we don't know what they are going to do under this.

Therefore, we are going to retain the power to make our political judgments later.

That, it seems to me, is a barefaced admission that Congress has not yet completed its political function; it is an absolute admission it is delegating to the agency authority of a sort it doesn't even know the precise content of.

So those are the only two points I wanted to add.

I think the legislative veto as a device is fundamentally, fundamentally and in all aspects, contrary not just to the separation of powers between the President and the Executive, but to our system of democratic government whereby the laws are to be changed by the vote of our Representatives.

Mr. **Moakley**. Congressman Beilenson?

Mr. **Beilenson**. Just to say that I thought the Professor's testimony was very good and very helpful.

I think also that Mr. Rhodes went to the heart of the matter when he talked about institutional defects, not only the so-called iron triangle situation, but also the mere fact, if you can call it that, that we are either called upon or take it upon ourselves to legislate in so very many areas we simply don't have the time to do it as well or as carefully or as wisely as we should.

We have passed a lot less authorizing legislation in the past 2 or 3 years than you folks did before some of us arrived here. I think that is part of the answer.

I also think we have to start depending more than we have in the recent past on the committee system. When we start legislating on the floor, rewriting bills on the floor in terms of amendments by nonmembers of the various committees, we get into all kinds of areas; we are not legislating carefully or thoughtfully the way we should.

To the extent you can get back as much as possible to the former, I think we will make fewer mistakes in terms of legislating so broadly that neither we nor the agencies that have to carry out and administer the laws are able to understand what we are trying to do.

Mr. Moakley. Professor, I asked the question of Mr. Morrison and I would like to ask the same question of you, do you think judicial review and congressional oversight come just too late and that there should be some vehicle put in place by the Congress to remedy problems that we might anticipate with proposed regulations?

Mr. Scalia. Yes; I think that that is a problem. I think it is a problem that ordinarily arises because of the single focus aspects of Agency action, my cause to the exclusion of all others.

The solution for which, it seems to me, is within the executive branch. It is not my impression that the President and the Congress disagree on what is excessive regulation most of the time.

I think by and large they are generally in accord on the issue. That is why we favor, the bar association favors greater Presidential involvement in the rulemaking process.

That will be at an earlier stage, and that is a stage at which the broad view can be brought to bear upon the Agency's proposed regulation.

I think it is very difficult for the Congress to get involved at any early stage.

It is even difficult for the President to do so but at least there is a good shot at it, it seems to me. That is the device I would use to bring some relief to bear at an early point.

Mr. Moakley. And also we were privileged to have the counsel for the *Chadha* case here. We asked him directly about the possible outcome. Do you think that the Supreme Court may rule on the legislative veto in the *Chadha* case or sidestep it?

Mr. Scalia. It is very hard to say. My guess will be that they will rule on the legislative veto, but they will rule on the legislative veto in the context of *Chadha,* which is perhaps the best possible case for the executive branch.

I think it will be held unconstitutional in that context and unless I am mistaken the Court won't go looking for trouble by trying to rule more broadly than it has to.

Along that line, the one statement of yours, Mr. Chairman, that I disagreed with during this whole morning session was with your statement that—something to the effect that we can leave the constitutionality of it up to the Court that it is ultimately the Court that has the last word. I think that is a mistake.

Mr. Moakley. I don't think we should leave it up to the Court, but it is just the way it happens under our form of government.

Mr. Scalia. Well, it isn't what happens, in fact. In fact, maybe Congressmen don't realize it, but they have more to do with the making of our constitutional law than any of the other two branches.

In fact, the strong and consistent feelings of Congress concerning the constitutionality or unconstitutionality of a particular course of action will ultimately prevail.

The Court will change its mind if necessary, the commerce clause cases are a good example. It is only the part of the Constitution that is imbedded within the people that will ultimately prevail and the Congress is the most proximate expression of what the people believe. If you persuade yourself mistakenly that it is constitutional and persist in attempts to enact it, I have no doubt that sooner or later that view will prevail.

I think it would be destructive for not just our executive branch, but for the accountability of the Government to the people.

I really urge you, therefore, to not say, well, it is up to the Court. It really is very much up to you; it is something you ought to think deeply about, whether it is compatible with our democratic processes.

I think it isn't. Whichever way you come out, I hope you won't think that you can simply leave it to the Court.

Mr. **Moakley**. Any further questions?

Professor Scalia, thank you very much.

Mr. **Scalia**. Thank you, Mr. Chairman. It is always a pleasure.

Mr. **Moakley**. I apologize to the witnesses and my colleagues for the delay but we have nothing to do with the bells. We hope to schedule hearings for Members on October 21. The reason for the delay in scheduling is that we are awaiting action by the Judiciary Committee. They will possibly come up with some compromise on this issue which we should address.

The Subcommittee on Rules will now be adjourned.

[Whereupon, at 12:43 p.m., the subcommittee was adjourned.]

CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

WEDNESDAY, OCTOBER 28, 1981

House of Representatives,
Subcommittee on Rules of the House,
Committee on Rules,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room H-313, the Capitol, Hon. John Joseph Moakley (chairman of the subcommittee) presiding.

Present: Representatives Moakley, Long, Derrick, Hall, and Taylor.

Mr. Moakley. The subcommittee will come to order.

Today, the subcommittee will continue its hearings on the various legislative veto bills introduced in the 97th Congress. The hearing for Members who have sponsored such legislation had to be postponed to this date due to a scheduling conflict. On behalf of the subcommittee, I would like to thank our witnesses for their patience and willingness to rearrange their schedules to attend this hearing.

The major focus of this subcommittee investigation is congressional review procedures of agency rulemaking, with particular emphasis on the legislative veto. However, since the congressional review procedures will be considered in the context of overall regulatory reform legislation, we are open to comments on how these bills will affect other aspects of proposed amendments to the Administrative Procedure Act. I think it will be useful to hear the views of the members of the Committee on the Judiciary on whether the bill before their committee will alleviate some of the problems which the legislative veto seeks to address.

This morning we are fortunate to have with us the Honorable George Danielson, chairman of the Subcommittee on Administrative Law of the Committee on the Judiciary.

George has worked diligently to shepherd a comprehensive regulatory reform bill through both his own subcommittee and the full Judiciary Committee. The bill addresses many of the procedural problems which agencies face in drafting regulations.

Next, we will hear from Richard White, sponsor of H.R. 945. We look forward to hearing his testimony, which I am sure will draw from his oversight experience as chairman of the Armed Services Subcommittee on Investigations and as a member of the Committee on Science and Technology.

We will then hear from the Honorable Dan Glickman and the Honorable Thomas Kindness, both of whom are members of the Subcommittee on Administrative Law, will then testify. Both Dan and Tom have worked with George Danielson over the past two Congresses to draft a comprehensive regulatory reform bill. Their work has developed into what is now H.R. 746.

The subcommittee will then hear testimony from the Honorable Elliott Levitas who has emerged the major spokesman for those favoring legislative veto. Elliott has devoted a lot of time and energy to consideration of the problems with the current administrative rulemaking process and to what he considers the best solution, enactment of a generic legislative veto. As always we look forward to his testimony.

And finally, we will hear testimony from Mickey Edwards, sponsor of H.R. 2299. As a former member of both the Committee on Education and Labor and the Committee on Interior and Insular Affairs, he is well acquainted with the problems of agency rulemaking activities.

It is now my pleasure to introduce the Honorable George Danielson for his statement with respect to the legislative veto.

STATEMENT OF HON. GEORGE E. DANIELSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, ACCOMPANIED BY WILLIAM P. SHATTUCK, COUNSEL, AND JANET S. POTTS, ASSISTANT COUNSEL, COMMITTEE ON THE JUDICIARY

Mr. **Danielson.** I would like first to introduce my two counsels who are with me today, Mr. Bill Shattuck, who has been with the Judiciary Committee for a number of years, and Ms. Janet Potts, who has been with us over 3 years. Both have been very helpful to me in this matter.

Mr. **Moakley.** They have been very helpful to the subcommittee also.

Mr. **Danielson.** I was informed and have acted on that information that you really did not want a prepared statement today but you would be happy with points, and so we have prepared some points and I have lodged them with the committee.

With the permission of the Chair, I will run through them rather quickly, expanding slightly, because this really is my position on the subject.

Also, I will stay away from the arguments as to whether or not legislative veto would be constitutional for at least three reasons.

First, we have already discussed almost ad nauseam on the floor and in private groups, and there is nothing I could add.

Second, probably others will bring up those points and, third, finally, one of the most hopeful things along the subject of constitutionality is going to come to a head.

The Supreme Court has agreed to review the In re *Chadha* case from the ninth circuit, though it does not exactly fit legislative veto, though that subject being reviewed as adjudication rather than rulemaking.

This is the end of my discussion on constitutionality.

As to legislative veto, I have turned, in my congressional career, 180 degrees. In the 94th Congress when the committee of which I am now chairman was under the chairmanship of Walter Flowers of Alabama, we reported out a bill with legislative veto, and I supported it.

My change of opinion can be attributed only to a continued and intense exposure to the subject matter over a number of years and it has caused me to see what I consider to be the light on the subject, and I no longer favor legislative veto.

The version which is contained in the present H.R. 746 was reported as a part of H.R. 3263 in the last Congress.

We have made one or two very slight amendments to it which were intended to, and I believe, achieve the result of removing any conceivable constitutional inquiry.

The form in H.R. 746 is actually the legislative process itself. It is a resolution which originates in one House of the Congress and which must be passed in the other House of the Congress, submitted to the President pursuant to the constitutional provisions, and he would have the right to veto it or approve it and Congress would have the right to override the veto.

It would be clearly constitutional and really what it amounted to would be a very expedited and specialized form of legislative action. This may not satisfy some people's craving for legislative veto but I am sure that this would work and, second, I have no question but what it would be perfectly constitutional and legitimate.

Also, as an accelerated provision, I am sure it would do as much good as any other form. Here are some of the factual problems we envision.

Veto would necessarily increase delay simply because any time a rule was promulgated, if the Congress had a right to veto it, they would start down its veto process and the effective date of that rule or regulation would have to be delayed until after that process had been completed.

This runs head on into the problem that we run into most often in connection with rulemaking, with regulations. The most commonly voiced complaint is that there is too much delay in the process already.

We would simply be increasing that amount of delay, because you would have to take care of the veto process before you could have an effective date.

We receive the criticism of delay far more often than we do that the rules are necessarily bad in themselves.

Second, this would be an overload of our congressional system. We are already carrying far too much on our shoulders. We are deprived of a sufficient amount of time to give mature consideration to any things which deserve it and adding legislative veto on top of that would be an unnecessary and undesirable overload.

When you consider the fact that some 7,500 regulations are issued each year, of which about 150 at least are major regulations, the potential added caseload, workload on the Congress is phenomenal and I submit it is not an added straw to the camel's back, but it would be a ton of bricks.

Mr. MOAKLEY. Your legislation only deals with major rules?

Mr. **Danielson**. That is right. The other 98 percent, whatever it is, we are not even talking about them, because it is just too much, far too much to handle.

Now, also, there is such a tremendous variety in regulations. They cover the length and the breadth of our entire economic and social system.

Every time we pass any type of a major law we provide in that law that the person charged with enforcing it, the Secretary, if it is a Department, the agency's commission, is authorized and directed to issue such rules and regulations as may be necessary to carry out the purpose of this act. That is about as broad as you can describe it, but we should not forget what we are telling those people to do is complete the legislative process.

As we pass a statute or rule, law, we have given the broad outline, but there are many areas which we have not been able to address and rather than try to do it, which we cannot do effectively in a congressional body, we direct the agency, now, you finish the job by issuing your rules and regulations.

The variety is enormous. I have a few things listed here: food and drugs. Who in Congress is competent to pass on the food and drug thing as an individual? We may have one or two or three.

Chemicals; food additives; ratemaking; is there anything more technical than ratemaking?

The ICC has worked on ratemaking for years. The utility Commissions do the same thing. So many accounting features go into ratemaking that they defy our competence to handle them. Yet the people who work in those days, year in and year out do acquire that competence.

Ratemaking is something we should stay away from. We can certainly control the statutes and tell ICC to try to achieve a given goal but let them work out the details of doing it.

Corporate reorganization subject to SEC, many of us are lawyers but I would hate to have to examine every corporate reorganization. Let SEC do it. Let's get some good people down there and, incidentally, I think it is an excellent agency, let those people who work in the field each and every day, let those people do the work.

If they do it poorly, fire them, replace them, but get some experts in there to do that work. You and I would go to a general practitioner if we have pain, but the time we need bypass surgery we want a specialist.

Licensing, certificating under the FERC, are you and I competent to decide whether or not a nuclear regulatory rule is good or bad?

Get the people who understand nuclear physics to do that sort of thing. Oversight is what our role would be.

Let's watch them and entertain the complaints that come to our attention and look at it responsibly, but I don't think that Members of Congress have the competence to get down into the nuts and bolts of how you regulate the nuclear reactors, for example.

Tax laws; what is wrong with the IRS? That is why we have them. There is not a less popular agency in the Government than the IRS, not because it is inherently bad, but we all hate to pay taxes and, obviously, in any revolution, you kill the messenger first.

What I am trying to say is this: I practiced tax law for a number of years but I will stipulate I am not competent today without keeping up with all the advance sheets and day by day emersions in that work, I stipulate that I am not competent to do it, and there are others who have never done the work, and I can assure you that they are not competent to do it.

Leave that again to the experts. Supervise, have oversight, find out what they are doing and see that they do it correctly, but within the area of detail, and that is what regulations cover, let's leave the detail to the detail people who truly know what they are doing and not get ourselves mixed up.

Now, here is an inherently bad thing. If we were to adopt legislative veto, in effect we are adopting what we might call a copout, knowing that we have a mechanism which is supposedly going to do a review of those regulations and supposedly to prevent the agencies from going astray, we are going to be lulled into a feeling of security so that we can be more lax in our work.

We don't have to be quite so particular. We don't have to craft our legal draftsmanship quite so well because we have this safeguard behind the door that will protect us. Legislative veto will protect us and I can see us being lulled into a position where we will be even more vague in the way we delegate the instructions that we give and the nature of the draftsmanship of our statutes.

The point is, we are going to get a second pop at it. If we don't put out a good, well-drafted statute, we know we will get a second chance. I don't think we should give ourselves that copout. We should hold ourselves to the strictest possible standards. We should hold ourselves to standards which will insure that we will do our very best job in our delegation of authority through legislation.

What good does a veto do? A veto would veto the regulations, but what help is that to the agencies who are carrying out the purpose of the statutes we pass? If we veto nothing, we are conducting a negative exercise and that is no good, but we aren't telling the agency what to do because we are not rewriting the statute.

It is strictly negative and what makes us think that the agency can come up with a better rule than they had in the first place or makes us think we are wise enough to work out the details better than they and tell them, instead of doing X, do Y?

We have authorized and directed them to issue the regulations to reach those goals. Also, this goes back to the area of lapse of time. Oftentimes in a statute we are directing an agency to issue a rule within a given length of time. Sometimes a court on review of a rule will refer it back to the agency and say, now, OK, we are referring this back to you but issue a new regulation within a given time period.

If that is exposed to legislative veto, how are they going to stay within the time period? It would be impossible and, second, it might be very damaging to our economy, society, because if a regulation is needed badly enough that we have given them a deadline on it, there was some reason we gave them that deadline, and we don't want to put a delay on top of an emergency. It would not work.

I tend to think that if we put in veto we would be tending to draft a new process into our statute and rulemaking, the execution of our laws. If an agency knows that there is a veto capability on the books, the agency staff are going to be quite reluctant to issue a regulation unless they have some indication from the oversight or the substantive committee that, yes, this regulation is going to be pretty good.

You are going to develop a sort of alliance between agency staff in which they are back and forth, and in effect instead of a clean completely independent and objective set of regulations coming out, what we are going to get is kind of a consensus.

What can we do that the Congress is not going to come back and review?

I don't think that is wholesome.

Mr. **Moakley**. They will send us back the same rule under the enabling statute.

Mr. **Danielson**. That is correct. We are going to have something without any clearly defined structure, any clear body.

It is sort of like a handful of smoke, you can do what you can with it. You have nothing when you are done.

I don't think that is good for our Government, for the people, and not good for the agencies or the Congress.

I think we should tell those agencies in our statutes that the goal that we want them to achieve, and then leave them alone, let them achieve that goal, call them in on oversight, rub their noses in it if you have to but let's see that they do their jobs but let's not enter into a do-it-yourself operation when it comes to executing laws.

When you get into some real structural changes in your house, you will call in a carpenter, and that is what we ought to do in this situation.

Moving along here, incidentally the administrative conference of the United States, which is not a Government body except for its staff, it is lawyers and businessmen and what not from across the land, the adminstrative conference itself points to this liaison between agency and congressional staff as one of the great hazards if the events were to have veto. They are from the private sector as well as the staff being from Government sector.

We should listen to their suggestions, and this is one point that concerns them very greatly.

One other thing wrong I see in the veto, and I have sort of touched on it before, it takes some of the pressure off of the Congress, the pressure to come up with well-drafted laws, because we can see this fallback, second bite out there in the future.

We should feel we have to do the best possible job at all times. We have a fallback, a copout, then we will be more lax and, frankly, I believe that laxity in the drafting of statutes is one of the things that gave rise to the call for veto in the first place. Let's get away from that.

Now, we have another thing that has come to my attention, to our attention in our hearings, a rule is a rule is a rule, but many times they are groups of related rules. An agency needs to put out a rule to achieve a statutory objective. There will be one or two of those which carry the principal thrust of that rule. Rule and regulation, they are synonymous.

There will be one or two of a group of rules that carry out the principal thrust but in order to achieve that, there will be a periphery of two, three, four, five, six, eight related rules, which though they are not the rule that we may be angry about, they are necessarily supportive of that rule.

Now, in that event, don't forget if you knock out the major rule, you are destroying the effectiveness of those others, though they may still be on the books and people have to comply with them, or if you knock out one or more of the supportive rules, even though you like the major rule, by knocking out the supportive rules, you have thrown this legislative chemical balance completely out of joint and nothing else is going to work.

People are going to be caught between the rock and the hard place.

One regulation said they must do thus and so but another one says you must do something contrary. The conflicts would be intensified terribly, if we did not recognize that oftentimes rules and regulations are a package of related rules and regulations, and you have to treat the whole thing and not simply one element, even though it may be the most important element. You have to treat the whole package.

The veto exposes us to the possibility of not doing that carefully enough. Not only are sometimes rules promulgated in which there is a principal rule or implementing rules, but oftentimes rules are promulgated which depend for their effectiveness on other rules which are already in existence or rules come into existence which would depend upon some other rule.

I call them interrelated. They have a relationship between themselves. If you cut one of the threads of this fabric you destroy the entire fabric, or at least you threaten it seriously.

The point I am trying to make is that these rules and regulations frequently do not stand alone, and if you cut out one or two or three or four parts of this fabric of regulation you destroy the entire fabric, though it was never your intention to do so in the first place.

Now, do we really need a veto? I seriously question it. There is no record that I have been able to find that the Congress has repeatedly tried to reverse a regulation that some agency has made and that the President or the agency has prevented us from doing so.

I am not so sure but what we have built up a sort of a strawman. And we are fighting that strawman, when there is no historical evidence that the fact has ever taken place.

I am not aware of any effort that we have made with one or two, the *Chadha* case, certainly there is no big body of effort by the Congress to set aside rules and regulations which have been prevented by Presidential or other action.

This point was brought to our attention by Attorney General Scalia who has made a mission of studying legislative veto. He has gone back to the University of Chicago where he teaches, but if you will examine our records, you will find there is no big body of dead legislative efforts at which the Congress has tried to set aside a regulatory action and has been stymied or prevented from doing so.

I respectfully submit that if a rule comes along which we find so offensive that it stirs our blood and causes us to react, if we simply communicate that fact to the agency, they would pay quite a bit of attention to it. They are not out seeking confrontation with the Congress. If they can avoid it they will, and that is why I think oversight is so good.

Any time you find a regulation coming along which you feel is way out of line with what we have attended, if we simply let the agency know, they are going to come along and try to correct the difference. I don't think the Congress is seeking confrontation, and I don't believe that the agencies are seeking confrontation.

I have had the privilege in the last few years of having hearings in which every agency at one time or another has been before us, and I get the feeling that they are trying to do a good job just as we are and if they realize that we are offended by some of their actions they will try to straighten it out.

If you will continue along the line of trying to have a better communication, more oversight, we are not going to have some of these problems and in fact I am not sure we have very many of them in the first place.

The problems of the world are great. We can't balance budgets and take care of education. We don't have enough oil, all kinds of things. We have to have a scapegoat to pick on and I think we are picking on the agencies.

Let's get away from it. There are some things we can do which would improve our situation, apropos of agencies and apropos of the public. We might lessen some of the public static we get. When the public complains about regulations, they are not really complaining about the regulations, but they are complaining about the law. They don't like this particular law we passed.

The agencies are the messengers. They issue that rule or regulation to carry out the mandate of the law, so they are the messenger. You always want to kill the messenger, so when the agency says to somebody, you are going to have to bury that toxic waste in a different manner or hold your remissions down to a certain level, whatever it may be, the people who are affected don't pick on the Congress. They pick on the agency that tells them.

I just saw something; something popped up in the paper in a related matter that I am interested in, because it comes in the Judiciary Committee—copyright. Two weeks ago the ninth circuit issued a decision saying that the use of a video tape recorder constitutes violation of the copyright law. I am sure it does. I have not read the decision. When we revised the copyright law in 1976, we didn't contemplate video tape recorders, so they are not in the Fair Use Doctrine.

The Los Angeles Times letters to the editor column is full of emotional, hot, offensive letters from the public blaming the ninth circuit court saying those things violate the copyright law.

Why, not because the regulators have said so, but because the Congress didn't see fit to include them in fair use. It is not the court, they are interpreting the law.

The same thing relates to regulatory agencies. When people complain about regulatory agencies, what they are really complaining about ordinarily is the law that the Congress has passed, so if we need to correct that problem, let's review our laws and take a look and see if we have done something wrong.

Change the law if we have to. That is the way to correct this.

Oversight again, I am going to come back to it time and time again, oversight is the remedy that we should follow. We ought to review our statutes now and then. The standing committees having substantive jurisdiction should now and then look over some of the principal laws which they are handling, and on which they start to get complaints because perhaps some of them need correction.

Just like our copyright law needs correction on this video tape recorder. We are not going to repeal that law, no way on Earth. We'll change it.

Some of you remember the Prohibition Act, when we got real noble, and said there will be no more alcohol. The public didn't support it; down the tubes.

A law has to be acceptable to the public, so if we have a law out in front that is no longer working, not acceptable, let's correct it and let's not pick on those regulators downtown. They are trying to do a good job ordinarily.

What can we do?

I want to put in a little plug for my H.R. 746.

We do require in H.R. 746, on major rules, that the agency conduct an analysis of this proposed rule before they promulgate it. What we are really saying is, take a good long hard look. Is this within your jurisdiction? Do you have the authority? Is there really a problem that needs to be addressed?

Will this regulation address that problem and carry out the thrust of the statute which gives us this authority?

Is there a better alternative? In other words, don't be casual about it. Look at it carefully. Is this really what we want to do and if it is go ahead and promulgate it.

Has the public had a chance to be notified? We are going to call for an agenda, a calendar. Agencies must let the public know in advance that they are considering putting out a regulation so that the public can come in and be heard, let their voices be heard, criticize, contribute, whatever, but let the public be heard so that they can have a voice in the ultimate product of the rulemaking committee.

The calendar which is a sort of supplement to the agenda but which will tend to eliminate conflicts between all the agencies proposing rules on a given subject, you will see if they mesh, but to try to eliminate those duplications and conflicts, it will help.

On major rules we are trying to provide at least once every 10 years an agency review its major rules to find out whether they still serve a useful purpose, whether they are a burden on society or the economy, to make what changes are necessary.

In other words, don't enact something and then forget about it, where it becomes obsolescent, if not obsolete, where it is counterproductive.

We are tightening up section 555 of the APA. We are going to require a rulemaking file, so that there is some proof in the file that the agencies have followed those procedures we have talked about.

There are many other items which do have something to do with improving rulemaking, and congressional review, we want the Congress continuously, but on a basis of time to time on agency action, to take a review and find out what is going on.

I am strongly for legislative oversight.

Last, I think that we should use more care in the crafting of our legislation. I have had complaints from agencies, you tell us to do thus and so but you really have not set out clear standards. The law is vague, indefinite, uncertain.

Maybe we do that on purpose sometimes so we don't get in a fight with some of our constituents, but come on, let's raise our level of courage a little bit. Even our constituents would be proud to know we have a Congress which says what it means and means what it says.

We should give a little credit rather than a sneer to those who are old maids in the way they draft their legislation, because to the extent our legislation does say something, it does give a direction and enables our Government to function, then we will have achieved something worthwhile.

Mr. Chairman, our society, our economy, our Government is becoming so complex that we cannot afford to fumble the ball. We have to do a good clear professional job, and I submit that the public would appreciate it.

I think that they would be relieved of some burdens if they knew we are trying to do what we say we are trying to do.

Sir, that is all I can tell you. There may be some other items but those are the main ones at least, and I say this, in summary, I was once a believer and I supported the concept of legislative veto. I have not talked about constitutionality. That is another thing but I have stuck to the practical elements here.

I no longer think it would serve a useful purpose, and I do not favor it.

I submit my case.

Mr. MOAKLEY. George, once again, thank you very much for a very interesting and definitive presentation.

I agree with most of what you have said, but I think you left out one important thing. One of the evils of the legislative veto was graphically demonstrated on the floor the other day when we were considering the District of Columbia sex bill. Twenty percent of the membership can take the leadership away from the Speaker and take 10 hours of debate on any item that they see fit which might be a product of some regulatory agency.

Mr. DANIELSON. That is an excellent example, and it also demonstrates something inherent in our democratic form of government, something very important, but at the same time a reason why we should not tinker too much with delegated authority.

I believe sincerely that the reason that we went through that veto process on the floor was a response to public pressure and the inherent apprehension that we have when our local people get all excited about something that may be more bogeyman than fact, and so we come to the rescue and overturn the agency which was set out to do the job in the first place.

I think that it is important that agencies be a little bit insulated from the political process. It enables those of us on the political side to do our job better because we know the executors of this policy are going to maybe catch the heat out there and, second, the agency, because they know that they are removed from the political process.

Let's separate those things a little bit, and I think that is an excellent example.

Mr. MOAKLEY. The legislative veto would make every Member of Congress responsible for the entire contents of the Federal Register. We would set up more bureaucrats within the Congress to look at what the bureaucrats within the administrative agencies are doing. We would be delegating more authority by not protesting anything in the Federal Register. By our silence, we would be approving an agency's rulemaking activity.

Mr. DANIELSON. I try to stay away from court review constitutionality, if we put on the books a proviso for legislative veto and then if we do not exercise that veto, if anything is ever challenged in the higher courts, if agency action is being reviewed on the ground that they went beyond our intent, what is a good lawyer going to argue to the court? That Congress had a right to veto if they did not approve of it?

They didn't veto it, ergo, they did approve of it; it is good and that is a valid argument.

I think a court will hang its hat on it now and then. We are building a problem for ourselves and also some of us have some constituents out there who are pretty sharp along this line, and if they know we have a right to bring up a veto and something they don't happen to like and we do not bring it up and they will be asking us to bring it up, we will have a flood of letters, I don't want the power of veto, because I am telling you every time an unpopular law or unpopular regulation goes out, you and I are going to get a flood of letters and pressure from the affected groups saying, "Look, you have a right to bring up a veto on this. It is bothering me, impacting my business, veto it!"

We have to go ahead with the veto or say, "Sorry, Bud, I am not going to do it." I don't want to have to tell my people, "Sorry, Bud, I am not going to do it."

I think veto is something that we ought to look at as though we once wanted to be cowboys or whatever. If we feel like fantasizing, let's do that, but not pass this.

Mr. MOAKLEY. You don't even have a chance to give any input into the regulatory process.

Mr. DANIELSON. There is nothing constructive about it. You cut off the man's head but you don't give him a new one.

Mr. MOAKLEY. Don't you think the authority in reviewing criteria would be greater than they inherently have in exercising rights over regulatory agencies?

Mr. DANIELSON. I am watching OMB with an eagle eye.

I think they should and must have some authority in reviewing the regulatory process, particularly within the executive agencies.

I look at OMB as being the President's right arm for the purpose of carrying out the day-to-day functions of Government. The President himself is too busy with other things, like AWACS, so what do you do? You have OMB, and that is a proper delegation.

I am not belittling it. I don't want OMB to have such strict control over the regulatory process that in effect it starts entering into the substance because they don't have the substantive know-how. They don't have the substantive responsibility. We should leave that with the agencies.

I think OMB should exercise some direction, see to it that they follow the procedures which we prescribe but leave the substance to the people for whom the statute creates this substance.

If we tell the Department of Agriculture, for example, to do a certain thing, our substantive law gives that responsibility to the Department of Agriculture, and the Secretary, under his direction, is to issue the rules and regulations needed to carry out our mandate.

We should leave that to him. Don't forget, the President appointed the Secretary of Agriculture. I would think that the Secretary is somewhat responsive to the President. He sure as heck would be if I were President, I can assure you.

He is not going to violate a policy, but we, the Congress, set policy. The President executes it, and if we tell Agriculture to do something, Agriculture is going to do it. OMB should say, "Now, look, you do it; get on the job. Don't waste time. Do it right but don't enter into the substance." That is up to Bob Bergland or the new Secretary, John Block.

Mr. **Moakley**. How would you handle the conflicts that are very apparent between the regulations issued by various agencies.

OSHA is given the mandate to have a safe workplace by requiring every slaughterhouse floor to be grated to prevent workers from slipping on the floor.

The Department of Agriculture requires every slaughterhouse floor to be of slick tile, for sanitary reasons. Both of these regulations seek to address problems with the same slaughterhouse?

Mr. **Danielson**. That is a good one. I use that one lots of times.

You don't want a wooden floor, either, and it absorbs blood and what-not, and that tends to putrefy—a real filthy mess.

In H.R. 746, we address this problem. We have each agency to issue an agenda each 6 months telling the public what rules they are going to work on within the ensuing 12 months, and then the following month the President issues the calendar and OMB plays a role in this.

Within the calendar, he coordinates the agency agendas from the different agencies, and you quickly find out where you have overlaps and conflicts. There shouldn't have been a conflict there, and I am not an expert. I can't tell you what kind of a floor they ought to have. You shouldn't have a conflict where the same slaughterhouse is told once to have a tile floor and once to have another kind of a floor. That is ridiculous. It is like that hospital thing, where you have to have hot water in every room, and one says it can't be more than 120 degrees, and the other one says it can't be less.

I recognize those things, and we are trying really; we are trying to eliminate those controversies, and we have a provision through the agenda and the calendar. We can get along with it. This is important—I am with you.

I will tell you where some of the problem comes from, not just conflicting regulations, but conflicting statutes, and that is why I say that Congress has got quite enough to do without getting into the regulatory process; we have quite enough to do to see to it that the statutes we pass are well crafted; that they address themselves to the problems we are solving or trying to solve. They don't slop over into other areas where they have no business.

We have our own problems, Mr. Chairman, and I submit that until we straighten up our own house, we really don't have much business getting down into some other house.

Mr. MOAKLEY. I agree with you. In order to get legislation through, a committee will purposely draft a bill with ambiguous language, just to get the bill out. The bill is then sent down to the regulators who say, "What does Congress mean by that?"

I think that we are probably as much to blame for some of the regulations promulgated as are the agencies.

Mr. DANIELSON. Mr. Chairman, I think we often are, not always, but certainly we are vulnerable to that criticism. Oftentimes, it is true. Sometimes I have seen people want to put things in which are so vague that you know they are inchoate, is what it amounts to. They have no real form.

We can live up to our responsibilities if we just try, and we ought to make a more diligent effort to do that.

We have enough to do, sir, and I don't think we need to take on another load.

Taking on 7,500 regulations a year to take a look at is impossible. It would require the creation of much additional staff, and we won't know what they are doing, either.

Let's not buy ourselves a problem.

Mr. MOAKLEY. We are transferring chores from nonelected officials to other nonelected officials.

Mr. DANIELSON. That is correct, and we are too busy to pay any attention to it. We are all working pretty hard, so we just don't have the time.

Let's leave pretty good alone, and then in addition, let's try to do our job better, and we are not going to have as many conflicting statutes and not have as many vague, indefinite, and uncertain provisos in those laws which we do have, and, with a little bit of oversight, I think the oversight plans that this committee has been working on are excellent. With a little more oversight, I really think we can get better cooperation between ourselves as legislators and the agency as an executive branch.

They are legislated to the extent that they implement the statutes which we pass, and they are executive to the extent that they enforce them, but they occupy an extremely important role. They are the interface between Government and the people.

We ought to improve their process by giving them clear direction, backing them up when we have to and giving them a little nudge now and then, but I think they will respond willingly; they will come back right away; I can promise you.

Don't forget, sometimes we criticize when we have no reason to.

If the agency action is within the parameters of the law we pass, their action cannot be criticized as being contrary to law.

You can attack agency action on the grounds that it is unconstitutional.

I am not touching on that today, but if it is, so is the law. That is a problem that is as much ours as theirs, if not more so, but if we prescribe in the statute that the agency shall act within these parameters, if then they do act within those parameters, we have no one to criticize except ourselves.

We have to see that they stay within those parameters—that is an oversight function—but if they do, we have no one to criticize except ourselves. Let's get a little better legislative draftsmanship around here.

Mr. **Moakley**. We enjoyed listening to you because you have really helped this committee in the past. Congressman Long?

Mr. **Long**. One of the things you said that was most interesting to me was there really has not been any concentrated effort made to override a set of rules or regulations. You can count them on what, one finger?

Mr. **Danielson**. I don't know of any. The *Chada* case, which the Supreme Court will be considering in this term——

Mr. **Long**. Are you making any progress at all in your conversations with the Congressman from Georgia?

Mr. **Danielson**. I love Elliott dearly. We are almost like brothers; the gentleman from Georgia and I have no personal problems.

We have a disagreement philosophically on the merits of legislative veto.

Mr. **Long**. I am an organization-type of a person, but as I look at a number of the things we have done, attempting to structure in a democratic system without allowing free play of the balance of powers and the human relationships that exist—I can see the end result is trouble.

Mr. **Danielson**. You sure do.

Mr. **Long**. The legislative veto might be—as somebody said in the other body about sunset legislation—it might very well be an idea whose time has come and gone.

Mr. **Danielson**. Glad you said, "and gone," and I agree with you.

Mr. **Long**. We have been looking at legislation that comes before the Rules Committee. The question of draftsmanship is related to the reforms we have initiated in the House over the last 7 or 8 years. We have substantially increased the places from which legislation will originate, and the people who will originate it, to the degree where your criticism of the quality of this legislation is perhaps more sound now than it has been in years. We have given subcommittees more authority and we gave them staffs. Both entities have to justify their existence—and I don't mean to be critical about this. But when we increased the sources of legislation, we did not increase the numbers of real technicians who are required to produce quality legislation and quality bills.

From the vantage point of the Rules Committee, there is no question that, in the last 5 years, the quality of the legislation passed by this committee, so far as draftsmanship is concerned—and that becomes extremely important when you start translating law into rules and regulations—has decreased very substantially.

Mr. **Danielson**. That is so true. It is gospel.

I tell you, and I think one thing we could consider doing is probably, Mr. Chairman, helping out, beefing up one of the most thankless, neglected, but important elements of our structure, and I am talking about the Office of Legislative Counsel.

They try hard. They do very well. There are some darn good legal draftsmen over there, and I am happy to say for my subcommittee we have had excellent cooperation from the office. They have a young lady over there named Sandy Strokoff, who is excellent. But they are underfunded, understaffed; but when we come to a real tough problem—and I consider myself to be a pretty good lawyer—but I find that when we come to a tough drafting problem, we get in touch with Sandy, and she helps us, and it is really good.

I was in the California Legislature for a few years, and we had an excellent legislative counsel office there. You need some nitpicking lawyers to go over these statutes.

You really need nitpickers, the ones who will know the nuances of the different words, who have a dictionary and aren't afraid to look at it.

You need people who are literally going to be Philadelphia lawyers in coming down the line and drafting these things right.

They also can do the needed research to check out whether you are running into conflict with some other statutory language already on the books.

That would help us a lot.

We all know about the staff of this committee and the staff of that committee. We all know we have a physician who can give us a flu shot, and what-not, but I wager 430 out of our 435 Members have never made the acquaintance of one of the legislative counsel members.

That is an element that I think you should consider. If committees would utilize legislative counsel far more and try to get things drafted as laws should be drafted, we will minimize some of these problems. You never eliminate them, but you will hold them down.

Second, I think we should take that old country expression, let's quit fixing things that aren't broke.

I am not sure we are going to fix anything by legislative veto.

I think that what we are doing is, we are yielding to the natural instinct of self-preservation.

Our constituents raise cain because they don't like some regulation.

We don't want to take the blame for it. We say, well, those darn regulators are always putting out regulations which are contrary to the laws we passed or go beyond the scope of their authority, whatever it may be; we are going to get the regulators. We don't want to take the blame and say, "Gee, I am sorry, I guess I passed a lousy law." When did you say that last?

Mr. **Long**. I have said that about a lot of legislation that I have been against.

Mr. **Moakley**. Some of this isn't because of the poor draftsmanship, but some of it was done purposely to get the bill through committee.

Mr. **Danielson**. I buy that, too. It is the legislative sleight-of-hand.

Nevertheless, if we did that, that is fine, but why blame the regulators? If they have some gummy mass out there that they have to work with instead of some clearly defined crystal-clear law, can we blame them if they come out with a gummy mass of regulation?

Mr. **Moakley**. Mr. Taylor?

Mr. **Taylor**. George, I want to express my appreciation for your testimony.

I think you are on target with most of it.

There is no question that we do have some imaginative people writing regulations in the agencies.

I remember in the OSHA regulations, they promulgated a rule that said everyone on a farm should be within 9 minutes of a sanitary toilet, 9 walking minutes.

It was reported that this rule would have required seven or eight toilets on a 640-acre plowed field in Kansas, seven or eight sanitary toilets.

You know, many times these things that agencies try to do go beyond what I think we had in mind when we pass a bill. I agree with you, we often fix too many things that are working, in the legislation itself.

We found cures to diseases that don't even exist in this place, and we try to pass these laws. Of course, agency regulation writers are imaginative people, and they often do go beyond what I think is reasonable, and it stirs people up, and they do make a demand on Congress to do something about it.

We are elected. The people who complain about regulations can't talk to the regulator down there, so they come to us. I think that proper oversight—I agree with you it is necessary—should include some way for us to say "No" to regulations. Heavens, you know the world is replete with regulations that are ridiculous. Some of them are really ridiculous.

I had one case of regulatory overkill in my district. I had a whiskey barrel manufacturer tell me about his situation. The EPA came down and told him he was in violation of the pollution standards, and, of course, he was an Ozark hillbilly, and he knew how to make whisky barrel staves, but he didn't know all of the technical things about EPA's rules and how to comply. He said, "You tell me what I need to do."

They told him the type of equipment he would need to install to control his smokestack emissions.

He ordered it, and they told him they would give him 30 days to get within compliance, or he would be fined so much a day.

He ordered the equipment. He waited, and he waited, and it didn't come, and he kept stalling, because he had a large payroll to meet, a lot of expenses.

He went beyond the 30 days and had a pretty sizable fine built up, and they came back, and he said, "Well, I ordered the equipment and it didn't come," and so then he got on the phone and called the outfit in St. Paul, Minn., and they had been closed down by the EPA.

So, you see, he was on a collision course with calamity there.

He had something like $200,000 in administrative fines built up against him by the time he decided to challenge the EPA's authority to treat him this way.

He later went to court and won.

George, we fought a revolution in this country one time because we had taxation without representation, and because, as the colonists said, the king has erected a multitude of new officers and sent hither swarms of officers to harass our people and eat out their substance; and people feel that they are being subjected to this plight again.

I don't think we can correct all the regulations in all the agencies. I hope there is some way, and maybe your legislation will do something about getting these people to become a little bit more responsible.

I told a story during one of our earlier hearings about the fellow—and this happened in this administration—from the National Highway Traffic Safety Administration. He talked about regulating a new rural mailbox. He said they were thinking of promulgating a regulation down there that would require every rural-free-delivery patron in this country to buy this new rural mailbox, and he had invented it. It would collapse when you ran into it.

I don't know of any quicker way to start a revolution than to go out and tell 37 million people you have got to buy this rural mailbox invented by this fellow down at the Department of Transportation.

That is what has brought such an outcry for a legislative veto and some requirement that elected officials look at some of these things and to protect the people from some of these regulations that have been promulgated that actually are driving them up the wall.

Mr. **Danielson**. I can only endorse everything that you have said. I am a country boy. I was born and reared in northeast Nebraska, and I am a true country boy.

Well, now I live in Los Angeles, which is all concrete and asphalt.

I have cultivated a lot of corn and also shocked a lot of barley.

You don't need a sanitary toilet every so many acres. We used to have a chokecherry thicket; very good.

Mr. **Taylor**. Kind of sticky, too.

Mr. **Danielson**. I understand that, but at the same time I remember the Declaration of Independence. The king had created a lot of offices, and do you know who the king is in this country? We are. We created a lot of these problems, and we have to be more careful.

I cannot address the charred oak barrel stave gentleman. That is the way to age whiskey. However, but I can say this, that I would think, I am strongly suspicious that within the law that they were implementing, they probably were not given enough direction to prevent that. They were probably acting within the law, and that is the shameful part of it.

I want to stipulate, I am speaking in ignorance here, but I am positive of one thing; that we frequently are so lax in what we tell them to do, that they can run away with these things.

It is like giving them a direction to make the world a safe place to live. You were wide open to anything on that, and we shouldn't tell them, make the world a safe place to live. We should give them some idea what we want them to have, and have oversight, and rub their nose in it if they do it wrong. We have to do our job.

We are probably as much at fault, if not more so, than most people.

Mr. **Taylor**. The regulation writers and enforcers don't have any authority that is not given to them, but they often overdo things.

Mr. **Moakley**. Congressman Hall?

Mr. **Hall**. No questions.

Mr. MOAKLEY. The recent vote we had on the sale of AWACS to Saudi Arabia is another good example of the disaster which could take place on the floor of the House when a resolution disapproving an agency rule is being considered. Under the House rules, each Member was entitled to 1 hour of debate. That is 435 hours we could have debated that bill on the floor of the House, had not a unanimous consent request to limit debate to 3 hours taken place.

Mr. DANIELSON. I think that falls precisely within the jurisdiction of the Rules Committee.

I dare not challenge the Rules Committee.

Mr. MOAKLEY. That is why we are looking to experts like you to help us out.

Mr. DANIELSON. I am having more fun than you are, so I am not complaining, but I thank you for the generous amount of time.

Mr. MOAKLEY. I looked at your bill, and I think your bill is great. Of course, I would like to add a little bit to it, but I think your bill handles the issues of regulatory reform in a proper way that won't wreak havoc with the House.

Mr. DANIELSON. The proposition you have has a tremendous fascination for me. I am not sure that it would be an unbearable burden on the existing bill. Everything is not going as smoothly as goose grease in the legislation I have.

There is opposition to it.

May I say, in departing, if I may, that I thank you for this opportunity, and I know that legislative procedures and structure are probably the least sexy subject in the world, so far as public interest is concerned. If I were going through this with my local Kiwanis Club, they would all be sound asleep.

A few years ago, I took part in passing the copyright law of 1976; it was the first time since 1909, a massive piece of work. I come home to campaign, and I talked about passing a copyright law. They all went to sleep. Happily, it was also the year of swine flu, so I started talking about swine flu, and I got their attention that quickly.

Legislative reform is just about as sexy as copyright, but I like it.

Mr. MOAKLEY. You have spiced it up as much as you could.

Mr. DANIELSON. Thank you very much.

Mr. MOAKLEY. The subcommittee will now hear from Congressman Richard White, sponsor of H.R. 945.

I thank you for waiting.

STATEMENT OF HON. RICHARD C. WHITE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. WHITE. You have laid a very fine predicate for my bill, which calls for a one-House veto. I will ask that my entire statement be placed in the record as though delivered.

Mr. MOAKLEY. Without objection.

Mr. WHITE. What I am doing swimming upstream today, is to present a case that I think is based on commonsense, and which draws on our common experience in Government; in other words, what really is, not what we would like to see.

I testified principally on a bill similar to H.R. 945, 3 years ago, and the problem has been this, as I have determined while traveling through my district; I think the same attitude prevails throughout this Nation.

There is a strong feeling, and I think it is valid, that the agencies of Government, the so-called bureaucracy, have subverted the purposes of Congress on numerous of occasions.

I don't think it has always been because we have not given them necessary direction. There is no way that this Congress can dot every "i" and cross every "t" when we pass a bill, so when we delegate power to the agencies downtown, many of whom have their own private ax to grind, and their own particular ways and views of developing government, they will then promulgate regulations which are far beyond the intent of Congress, and really are not touched with commonsense. You and I both know that.

These are happenings we see every day, and that is when we start hearing from the public.

The fact is, every time a regulation is promulgated relating to restriction of society, to some small degree, it is an erosion of our liberty, our ability to function in this country. To this day we have a mass of regulations that has grown to the point where little by little we have been restricted in our private operations.

Now, there is more involved than just this question of restriction of the actions of people. It is very imperceptible and not even seen by the general public.

They know in their collective judgment what makes commonsense and what does not, because they know what is beyond the realm of reason. And that is when we start hearing from our constituents. Another concern is that the regulations that have been promulgated have been one of the primary factors of inflation in this Nation that has eroded the dollar value.

Regulations are costing billions of dollars today and are actually impacting on everybody, and especially on those on fixed incomes who can ill afford the erosion of their buying power.

Mr. MOAKLEY. If I may interrupt you, we have had estimates that regulations indirectly have cost up to $100 million.

Mr. WHITE. That is not surprising. For example, in the pharmaceutical industry regulations are one of the reasons why medicines cost so much.

We cannot, if we have the responsibility of governing, continue to be satisfied with what has gone on in the past.

We can say we have to have more oversight, but we have had that power all along. Every committee up here has oversight power, and every committee is earnestly pursuing their oversight responsibilities.

I represent the chairmanship of one of the oversight committees, too. We do what we can.

But we don't have power, in itself, to make the changes necessary.

We can urge; we do what we can with the agencies, but they don't necessarily have to comply, and they circumvent our requests time after time.

President Reagan has recognized the problem, and President Carter did, but President Carter did not do what he said he was going to do. We met with him before he was sworn in, and I brought the point up myself about curbing the regulation, and he said yes, that is one of our priorities. Somehow, his administration never was successful in these efforts.

To Mr. Reagan's credit, his administration has ordered procedures to curb some of the regulations, but they are mainly predicated on cost-benefit ratios. That is part of the picture, but not the total picture.

We are interested, as legislators, in what is good legislation, because the fact is, when these rules are promulgated, they are making law. They are changing law, and they are making permanent law, as permanent as any law is, as far as that goes, in addition to congressionally enacted laws; so, in other words, regulation promulgators have become another lawmaking body in this Nation today.

Congress, I feel, should contain and control and retain the control on what becomes law in this Nation in conjunction with veto power of the President, and review by the Supreme Court. It was never contemplated by the makers of this society, in the initial stages of this Government, that this phenomena would ever develop where we have another body of law in terms of regulations that are as controlling or possibly more controlling.

How many times on this floor have we tried to reverse an IRS ruling or gotten together and sent letters, signed petitions, asking the IRS to make some change we feel is improper? The fight we had on saccharin, if you recall, was about the very same thing, when the body of evidence really did not give a commonsense touch to their regulation, at least in our opinion.

In the last century there have been 200 laws containing 270 separate congressional veto provisions, and they haven't presented any problem to Congress.

There are a lot of regulations we have to review. What would be the mechanism?

Obviously, you would expect that the agencies under the law would refer to Congress, then to each committee, the regulation and its rationale, and then the Congress would have 60 days within which to act.

The committee itself is not going to go through every one of those regulations, but if there is any characteristic of society today, there are many special interest groups representing every segment of society. Such as environmentalists or Boy Scouts, or whatever; they are looking at these regulations, and they would be the ones that would alert Congress, as they already are doing today. We won't have to worry about this mass of regulation we would have to review. Once alerted then our committee staffs would look at those particular regulations, and if indeed there is a flagrant violation, we would probably go forward with committee action and action on the floor, which is as it should be.

We need to follow up to be sure our laws are instituted properly when we have a vague general delegation of powers to the people.

I say that if there is a threat of a congressional veto on a regulation, and the requirement to submit to Congress a report of a rule proposed, and the rationale, we are going to find that the agencies will be most careful about what they promulgate.

They are going to have to be awfully cautious and be sure they have got their ducks in order before they ever bring a proposed rule to Congress, because they understand they could be embarrassed with some authority with teeth and not just a letter to the Secretary, saying, "Mr. Secretary, we don't like this."

It would certainly act as a deterrent, and it would improve Government a great deal, and it would also eliminate to a great degree the bureaucracy.

To mention a few concerns such as whether this would lead to interminable debate on the floor.

Well, the rules could limit the amount of debate you would have on such a bill as this. As to having a 1-hour debate per person on the floor on the last bill of this nature, you prevented that by a rule.

We are not sitting here catatonically. I already mentioned I thought the interest groups would certainly alert us to what was required.

In finality, the committee gives the direction to the agencies of how they interpret a particular law and how they intended the law to be exercised in cases where they go beyond the scope of what the Congress had in mind.

The executive branch has always had the ability to control regulation before, and that is why we are here today; that control has not worked.

Congress has to discharge its responsibilities. Sometimes we are going to give broad language to agencies, since we are not all-encompassing in our thinking; we have to do that, and then we have to have some means of correcting aberrations from that law in its exercise.

The exercise powers are not as potent without the ability to mandate to the agencies through the exercise and the threat of a one-House veto.

That is generally my testimony.

[Mr. White's prepared statement follows:]

PREPARED STATEMENT OF HON. RICHARD C. WHITE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I had the pleasure of testifying before this subcommittee a little over 3 years ago in support of the concept of the one-House legislative veto. Since 1978, we have seen a great change in the political climate of this country, culminating in the election of a President who ran on a platform endorsing less intrusion of the Federal Government into the private sector.

I apprised this subcommittee 3 years ago of the widespread and deepseated concern among my constituents over the increasing impact of Federal regulation on all facets of their lives, a concern obviously shared nationwide. I believe that President Reagan understood that discontent and frustration and was successful in convincing the electorate that his administration would place a high priority on exerting greater control over the Federal bureaucracy and its administrative rulemaking apparatus.

In furtherance of that goal, President Reagan has made regulatory reform one of the four elements of his plan to revitalize the economy. On February 17, he implemented Executive Order 12291 which requires the departments and agencies of the excutive branch to review the costs and benefits of proposed regulations which are classified as major and, where feasible, to choose that approach which is the most cost-effective among the various alternatives. The Office of Management and the Budget is directed to serve as a clearinghouse, with the authority to review the regulations and the accompanying cost-benefit analyses prepared by the agencies. If OMB has questions about the thoroughness of the cost-benefit analysis or about the appropriateness of the regulation, it can resubmit them to the agency for further consideration.

Executive Order 12291 has rationalized management direction over the rulemaking process. However, since the regulatory reform procedures have been in place for only a short time, there has not been an independent study of their effectiveness in curbing excessive and costly regulations. Further, some doubts have been raised about the legality of the order in terms of whether the procedures established are consistent with the Administrative Procedure Act and whether the President has exceeded his authority by issuing an order which appears to displace the discretionary authority of the agencies in possible violation of congressional delegations of rulemaking authority. These are issues which must be carefully examined by the Congress as it drafts legislation to codify the Executive order into law.

Suffice it to say at present that the public concern over unreasonable and burdensome regulations has dissipated somewhat based on the perception that actions are being taken to curb the more arbitrary or capricious abuses of the rulemaking power.

Nevertheless, I believe that the need for strengthening congressional oversight over the implementation of laws remains as vital now as ever, and I feel that a uniform legislative veto procedure is the most effective means of oversight.

Much of the debate over regulatory reform has focused on cost-benefit analysis as a means of controlling the impact of Federal regulation on the economy and the marketplace, and this is the central focus of the Executive order. While these economic considerations are important, we have left unanswered the question of whether the regulations which are being promulgated do in fact carry out the intent of Congress in enacting the original law. The President or OMB cannot make that determination for us. If we are reluctant to take such responsibility in hand, the courts will ultimately be the final arbiters.

The central question, then, is: To what extent does the Congress retain control over that authority which it delegates to the agencies and departments to carry out the laws. We are often amazed at certain regulations which result for a specific law, as some are entirely contrary to our original intent. It does not speak well of us to continue blaming the unelected bureaucrats for exceeding the congressional mandate with which we have entrusted them, if we are unwilling to assume effective oversight responsibility. Our failure to take concerted action to ensure that the laws are being faithfully implemented as intended is, in my view, an abdication of our responsibilities to the people who elected us.

The mechanism of the one-House legislative veto, as myself and others have proposed, is very straightforward. Any regulation proposed by a department or agency of the executive branch would, in advance of its final adoption, be submitted to both houses of Congress and would become effective at the end of 60 days, unless during that time either House adopts a resolution disapproving the regulation.

The legislative veto guarantees that Congress remains the ultimate lawmaking authority. We have surrendered a great portion of this authority to the bureaucracies, which are able to issue regulations which are viewed as having the force of law, without benefit of further congressional approval or consideration. Although no one questions the need for Congress to delegate certain rulemaking functions to the executive branch, it must also be recognized that congress retains the authority to circumscribe the exercise of that power which is delegated.

It has been argued that Congress already has recourse to a number of alternative mechanisms for overseeing the regulatory process and, where warranted, for overturning agency regulations or for preventing their enforcement. For example, Congress can enact legislation overturning a particular rule or regulation. Or it can alter the jurisdiction of the agency, with the primary intent being to affect existing or anticipated rules. Also, it can deny the authorization of funds for the purpose of implementing the regulation. There are other more indirect methods of expressing congressional disapproval of regulations. Among these are the staging of committee oversight hearings, consultation with the agency, and participation in the comment period. The statutory means of overturning regulations are rarely utilized, as they are unwieldly, whereas the more indirect approaches do not necessarily guarantee that the agencies will take congressional views into consideration in adopting and enforcing the final version of the rule. Congressional oversight of agency rulemaking has thus been sporadic, uneven, and limited in scope.

Finally, I would now like to touch very briefly on several other issues which have been raised in past discussions of the legislative veto.

Critics of the legislative veto have voiced concern over the constitutionality and practicality of the proposal applied across the board.

The one-House veto is viewed by some constitutional experts as a violation of bicameralism. Constitutional objections have also been raised over a two-House veto if the President does not have the ability to counter-veto a disapproval resolution; this is seen as a possible violation of the separation of powers principle. Yet the fact remains that we have enacted close to 200 laws within the last century which contain more than 270 separate congressional veto provisions of some fashion. Although some of these have been challenged in the courts, there has never been a definitive Supreme Court ruling on the constitutionality of this method of congressional oversight. The adoption of a uniform legislative veto would require careful examination of this issue, but it should also be recognized that the debate over constitutionality cannot be ultimately resolved by the Congress, because that is not or prerogative.

Opponents also argue that the legislative veto procedure in practice would be inordinately time consuming and would generate additional work for the committees of Congress. The same argument, of course, can be made with respect to other types of regulatory reform mechanisms, including sunset proposals. In my view, we have the responsibility of overseeing the implementation of the laws we enact, and therefore I do not see this as a valid argument. The need to review the laws and their effectiveness becomes even more important with budgetary constraints limiting our ability to fashion new initiatives. The existence of the legislative veto does not mean that we would devote the same amount of time and attention to reviewing each and every regulation, but we would be able to flag those regulations which clearly do not carry out the intent of Congress. It would further serve as a constraint on the agencies in drafting the regulations.

We have been debating this issue for a number of years, but have failed to come to any resolution on the question of the uniform legislative veto. Meanwhile, we continue to give implicit approval to the concept of the legislative veto by attaching it piecemeal to separate legislation. As there is no evidence that public or congressional support for this proposal is diminishing, I urge that your subcommittee take favorable action on the legislative veto as a component of any regulatory reform bill that is approved.

Mr. MOAKLEY. Your bill, H.R. 945, deals with every regulation rather than just the major ones?

Mr. WHITE. Yes, sir.

Mr. MOAKLEY. I am informed that 350 regulations are passed daily?

Mr. WHITE. If this bill passed, we would probably find about a hundred pass daily.

Mr. MOAKLEY. Yours would have, or deal with, all the regulations?

Mr. WHITE. All the regulations would have the potential of being reviewed by Congress. They would not be reviewed by Congress generally.

You probably would have maybe one or two.

Mr. MOAKLEY. You would think that this bill would be like the carrot-and-stick approach; the regulators would say, "There is somebody up there watching us."

Mr. WHITE. I have been chairing a committee hearing on the National Petroleum Reserves. The law is clear, Mr. Chairman, what the Energy Department is supposed to do. They absolutely ignored the written law.

Had we had some control on the exercise of that law, we would have blocked them from avoiding its intent. Yet they persist in their attitude toward avoiding the law.

Some of these agencies are very arrogant in their attitudes.

I addressed a group of second-level executives at one time here in Washington several years ago, and it became apparent to me within the first 20 minutes of my talking to them, that they didn't think anybody else in this country had any sense; that all government should come from Washington, and that they, themselves, knew what was best for the people.

I say that the Congress, in its collective and representative judgment, knows what is best for the people.

It is obvious that Congress has to have a little more control on the regulations, on pronouncements of agencies, than they presently have, and I don't think it would be an overwhelming burden on Congress, because special interest groups—when I say special interest, I am talking about everybody in this country—would be the policemen who would alert us.

Mr. MOAKLEY. Congressman Taylor?

Mr. TAYLOR. I want to express my appreciation for your testimony. I think you are right on target, and you expressed the sentiments of the people of this country; we have gone too far with regulations over which they have no control. They feel, and rightly so, that the legislative branch is the Congress that they elected, the ones that represent them and should treat these abuses when they occur, and I know of no other way we can do it than to have some kind of legislative veto.

The people of this country are being harassed daily, and I think it is going too far; and we have people down there in various agencies who think there is not a problem in the world that they can't solve with their brains and the taxpayers' money, and we are running a little short on both; so this is a problem we face in this country, and one the people are concerned with.

I was at a meeting this morning where, the chairman of the President Council of Economic Advisors, Mr. Weidenbaum was talking, and he said there is no question regulation is costing the taxpayers of this country over $100 billion a year.

The administration is trying to do something about it. I agree with you; they are reviewing all regulations on a cost-benefit ratio based on dollars, but I think the more important test is the cost-benefit ratio based on the freedoms of the people of this country.

Again, I want to thank you for your testimony.

Mr. WHITE. There are so many illustrations today. When people are traveling down the highway, everybody knows what the speed limit is. Sometimes the police put an empty car by the road. They don't have anybody in the car necessarily, and yet people, seeing that car and knowing the potentiality of being caught, will slow down and obey the law.

The potentiality that Congress will exert by having this ability in its pocket will cut down materially on the regulations and will cause them to be more carefully drafted.

Mr. MOAKLEY. Thank you very much, Congressman White.

Next, the subcommittee will hear from Dan Glickman and Tom Kindness. They both have worked very diligently on H.R. 746.

STATEMENT OF HON. DAN GLICKMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS

Mr. GLICKMAN. I have asked that I could go first, because I do have a speech to give.

Mr. MOAKLEY. You have a speech to give other than here?

Mr. KINDNESS. On the other hand, no one is interested in hearing me.

Mr. GLICKMAN. I would ask unanimous consent that my statement be put in the record.

Mr. MOAKLEY. Without objection, the gentleman's statement will appear in the record.

Mr. GLICKMAN. I do serve on the Danielson subcommittee, and we heard testimony from you some time ago about the ideas to deal with the question of legislative veto and oversight.

I was the author of the two-House veto which was adopted over the 1- or 1½-House veto approach.

Probably the main thing I would like to say is I have changed my mind in that basically I have come down, after reviewing the situation, thinking that a veto idea is really not all that it is put up to be.

It is not a great idea to slow down the regulatory process, and it could do some harm to the congressional system. I think it would conceivably involve us in the day-to-day agency decisionmaking which could bog us down in a morass of trivia. That might not be happening if we limit it to major rules, but there are about 300 a year of those.

Mr. MOAKLEY. One hundred and fifty?

Mr. GLICKMAN. It depends on how it is defined.

Mr. MOAKLEY. Do we say anything over $100 million?

Mr. GLICKMAN. Anything over $100 million, or anything that has substantial health and safety impacts.

In any event, and in my judgment it would seem to me that legislation should be carefully drafted so that agencies have no doubt of its intent and scope of authority; and if Congress passes clear legislation, that a combination of continuing oversight and use of the appropriations process, particularly riders on appropriations bills are about the best way to deal with the issue.

A second concern is that a genuine legislation veto provision would allow an administration, whether it be a liberal Democratic or a conservative Republican, to misdirect regular congressional oversight by overloading the system with a multitude of new or revised rules.

Congressional committees would thus be forced to constantly focus on regulatory minutiae, since a failure to veto rules might well be construed as approval of those rules not vetoed.

I have a feeling we would get bogged down in trivia which tends to happen in any legislative body.

Third, I know people are saying the bureaucrats are out of control. I know the author of H.R. 1776 uses that as kind of a stock slogan, but I think they are out of control, because we and the President have allowed them to become out of control.

We control the statutes and the budgets, and if we are out of control it is because we, through inaction, allowed this to happen.

There are some malcontents down the road, but it is our responsibility because we have passed unclear, vague and open-ended statutes over the years. The bureaucrats have taken them and run. We can tighten the reins, but do so in advance, so that ill-conceived regulations are not proposed, not merely after the fact.

Also, though it may not have occurred to some proponents of legislative veto, it is a tool that can be effectively used by both conservatives and liberals. Those who oppose regulations assume that legislative veto will be used to prevent agencies from issuing extensive regulations.

However, those who favor regulating an area could as easily seek to veto regulations for not going far enough. This is one of the main reasons that the Reagan administration has refused to endorse a generic legislative veto, recognizing that such a provision could prevent its attempts at wholesale deregulation.

I again point out and when we are dealing with a regulatory reform bill, these laws are like justice, are blind, and this bill is going to work just as easily if Ted Kennedy is President, if Ronald Reagan is President, and the law has to be written for that universal application.

Some congressional increased oversight is necessary, but I am concerned that the approach proposed in your bill before this committee could be excessive. I think it is preferable to the one-House veto provisions, but it, nevertheless, creates another layer of congressional bureaucracy.

At the very least, it will generate additional congressional staff and paperwork and again unsettle the committee structure of the House.

We all know that the Congress is under strong pressure to hold our spending down, just as we are asking other parts of the Government to do. But, if a legislative veto provision were enacted across the board, there would be an incredible push to move just the opposite direction. To adequately review the volume of regulations that are published daily in the Federal Register and to understand their implications completely, there would be cries for more staff and that would cost more money.

There would be a tendency for staff to grow topsy-turvy so regulations wouldn't get through that should have been blocked. Given budgetary realities, that is not a viable option.

I would add that we have been using an alternative means of blocking ill-founded regulations over the last few years. Through the appropriations process, we have become accustomed to using riders restricting the use of funds for implementing various regulations or policies as a way of reining in the bureaucracy.

I have opposed efforts in our own caucus to tighten those rules further, because I think they are performing a useful purpose, and the really bad rules usually get stopped or prevented from being implemented in the first place.

This is a good method, along with normal oversight.

I strongly believe that we must address the question of congressional oversight of agencies in a direct way. Instead of attacking regulations, which are the end product of agency attempts to implement legislation, we must recognize the committee structure of Congress so that we can more effectively monitor agency programs from creation to implementation.

These thoughts are not going to be agreed to by the Congress in the next year or two but I think that needs to be done.

For example, I suggest that the Budget and Appropriations Committees be merged so that aggregate expenditures and individual program funding are determined in the same place. What we have now—with the Budget Committee setting overall levels and outlining "assumptions" to achieve them, and the Appropriations Committee reworking those "assumptions," that is largely duplicative and muddles the budget process.

In addition, terms for authorization should be shortened so that congressional committees are required to frequently review the programs of agencies under their jurisdiction.

Beyond that, I would propose that we change committee membership assignments so that each of our committees has a balance of "old hands" who have the advantage of experience and understanding of the programs over which they have jurisdiction and new members who might bring fresh ideas and a more questioning perspective to the committees.

We all know that the bulk of our legislative work takes place in the various committees, and, when major amendments are offered on the House floor, they are likely better received when offered by a member of the committee who has the benefit of the background gained from committee hearings and markup.

That is altogether logical and sensible. But it is also a reality that, over the years, committee members find themselves taking a personal, often protective, interest in programs which they have helped formulate.

Being a member of the Agriculture Committee and just coming off the farm bill, I can tell you it happens over and over again. It happens on Public Works, Armed Services.

We become protector of every item of jurisdiction. What I would say, is, it creates a cozy relationship, and what I would like to see is a two-thirds/one-third split of committee membership with most being permanent members as is now the case, but one-third serving in temporary capacities not to exceed two terms, much as is now the case with our Budget Committee.

In effect, members would be allowed to serve on one major and one minor committee on a permanent basis, but would also be able to bid for temporary assignments on either a major or minor committee with service not exceeding two terms. Once a member has served on a particular committee in a temporary capacity, he or she would not be eligible for a further temporary assignment to that committee.

If you look at the troublesome area of regulation, you can trace those back to committees of jurisdiction in which this situation existed where there was not the effective amount of oversight done because the folks on those committees, and I am not blaming us, tended to protect the jurisdictions that they represented, and so it just is an idea.

It is something that I think structurally needs to be done. We may need to clean up our shop here as much as blaming the bureaucrats downtown for misconstruing the intent of the law.

Your idea is better than any of the veto ideas that I have seen. I worry that it could have zero power or too much power.

I thought I would give you some of my thoughts today.

[Mr. Glickman's prepared statement follows:]

PREPARED STATEMENT OF HON. DAN GLICKMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS

Mr. Chairman and members of the subcommittee, it is a pleasure to appear before you today.

Legislative veto has been the subject of intense scrutiny by the Subcommittee on Rules of the House for two Congresses. During this time, you have carefully examined the constitutional and policy issues involved in legislative veto legislation. As a member of the Judiciary Subcommittee handling regulatory reform legislation, I have been similary occupied during those last two Congresses. In fact, during the 96th Congress, I offered a two-House veto provision to the regulatory reform bill then pending before the subcommittee.

I appear before you today because, although I have historically supported legislative veto, and in fact may continue to support legislative veto provisions for specific agencies or programs, I have become convinced that an across-the-board legislative veto, while in my view constitutional, is bad public policy.

One of the strongest arguments in favor of across-the-board or "generic" legislative veto is that it will greatly improve the oversight of administrative agencies by the Congress. At first blush, this appears to be a good argument, since Congress would then be able to reject each specific rule with which it disagreed.

However, this type of involvement in day-to-day agency decisionmaking would bog Congress down in a morass of trivia. It would consume enormous amounts of congressional time and energy that could be far better used in assuring that statutes are effectively, appropriately and unambiguously written. Legislation should be carefully drafted so that agencies have no doubt of its intent and the scope of authority it allows. It the Congress passed such clear legislation in the first place, I believe that a combination of continuing oversight and a thorough appropriations process would enable Congress to assure that agencies implement laws appropriately.

A second concern of mine is that a generic legislative veto provision would allow an administration to misdirect regular congressional oversight by overloading the system with a multitude on new or revised rule. Congressional committees would thus be forced to constantly focus on regulatory minutiae, since a failure to veto rules might well be construed as approval of those rules not vetoed. While we are bogged down in that detail, more significant, broad policies could be fundamentally redirected.

I would like to point out that those who support legislative veto claim that it is necessary because "The bureaucrats are out of control". I assure you, bureaucrats are out of control only if Congress and the President allow them to be. Again, I emphasize that we control the statutes under which they operate and the budgets that fund their activities. If bureaucrats are out of control, it is because we, through inaction, have allowed this to occur. We can and should tighten the reins, but we should do so in advance so the ill-conceived regulations aren't proposed, not merely after the fact.

Also, though it may not have occurred to some proponents of legislative veto, it is a tool that can be effectively used by both conservatives and liberals. Those who oppose regulations assume that legislative veto will be used to prevent agencies from issuing extensive regulations. However, those who favor regulating an area could as easily seek to veto regulations for not going far enough. This is one of the main reasons that the Reagan administration has refused to endorse a generic legislative veto, recognizing that such a provision could prevent its attempts at wholesale deregulation.

There is no doubt that increased congressional oversight of agency actions is both appropriate and necessary. However, I am concerned that the approach proposed in H.R. 1, which is before this subcommittee, is excessive. Although in some respects it is preferrable to the 1½-House veto provisions of H.R. 1776, it nevertheless creates still another layer of congressional bureaucracy—a select committee—which on the one hand might become a useless appendage or, on the other hand, a "super-committee". At the very least, it will generate additional congressional staff and paperwork and again unsettle the committee structure of the House.

I would add that we have been using an alternative means of blocking ill-founded regulations over the last few years. Through the appropriations process, we have become accustomed to using riders restricting the use of funds for implementing various regulations or policies as a way of reining in the bureaucracy. That's been an effective mechanism for oversight and one that fits readily into the present House procedures and committee structure. It is also a limited method, one that allows us to easily recognize when we need to change the underlying legislative authority.

I strongly believe that we must address the question of congressional oversight of agencies in a direct way. Instead of attacking regulations, which are the end product of agency attempts to implement legislation, we must reorganize the committee structure of Congress so that we can more effectively monitor agency programs from creation to implementation. For example, I suggest that the Budget and Appropriations Committees be merged so that aggregate expenditures and individual program funding are determined in the same place. What we have now—with the

Budget Committee setting overall levels and outlining "assumptions" to achieve them and the Appropriations Committee reworking those "assumptions", that's largely duplicative and muddles the budget process. In addition, terms for authorization should be shortened so that congressional committees are required to frequently review the programs of agencies under their jurisdiction.

Beyond that, I would propose that we change committee membership assignments so that each of our committees has a balance of "old hands" who have the advantage of experience and understanding of the programs over which they have jurisdiction and new Members who might bring fresh ideas and a more questioning perspective to the committees. We all know that the bulk of our legislative work takes place in the various committees, and, when major amendments are offered on the House floor, they are likely better received when offered by a member of the committee who has the benefit of the background gained from committee hearings and markup. That is altogether logical and sensible. But it is also a reality that, over the years, committee members find themselves taking a personal, often protective, interest in programs which they have helped formulate. I would add that long tenure on the various substantive committees also often results in rather "cozy" relationships with lobbyists for the interests who stand to gain—or lost—from the programs under the committee's jurisdiction. That doesn't add to the willingness of committee members to vigorously exercise their oversight function. It also lessens the likelihood that the committee members will say no to the desires of the agencies or of the interests they serve.

Specifically, I would urge us to consider a ⅔-⅓ split of committee membership with most being permanent members as is now the case, but with ⅓ serving in temporary capacities not to exceed two terms, much as is now the case with our Budget Committee. In effect, Members would be allowed to serve on one major and one minor committee on a permanent basis, but would also be able to bid for temporary assignments on either a major or minor committee with service not exceeding two terms. Once a Member has served on a particular committee in a temporary capacity, he or she would not be eligible for a further temporary assignment to that committee.

To make this work, it would be necessary to adjust the number of members on each committee, but that would, of course, be necessary should my earlier suggestion to consolidate the Budget and Appropriations Committees be adopted. In terms of changing the make-up of the committees to assure that they are more objective, I think it is a change well worth making. I also realize it will not be an idea that will win any popularity contest around here.

Clearly, there is no easy solution to the problems that gave rise to the idea of legislative veto. However, I strongly believe that a generic legislative veto will not solve the problems it addresses and may, in fact, exacerbate them. I therefore urge this subcommittee to reject the legislative veto proposals before it and to work toward restructuring the committee system of the House so that the House can effectively oversee agency implementation of congressional mandates.

Mr. MOAKLEY. Any questions?

Mr. Kindness.

STATEMENT OF HON. THOMAS N. KINDNESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. KINDNESS. I do not have a prepared statement to submit for the record today, and would point out that I asked for the opportunity to testify today largely for the purpose of again assuring that the record indicates my support for the sort of approach which is incorporated in your bill, Mr. Chairman, which provides for a committee that would have a separate existence from the committees of substantial jurisdiction.

Mr. MOAKLEY. I know that you basically believe in that.

The only difference you and I had originally was you wanted a joint committee, and I wanted a House committee?

Mr. KINDNESS. Yes, Mr. Chairman, and I grant you the difficulties of establishing a joint committee are so great, that it is perhaps not a realistic goal to establish, but I believe that in the long run, it would appear to avoid the problems of having a committee of super-jurisdiction.

Mr. MOAKLEY. I completely agree with you.

Mr. KINDNESS. In the in-between phase, I do believe the sort of approach that you have suggested, Mr. Chairman, has a great deal of merit to be more fully considered by the House of Representatives.

I am, however, on the horns of a dilemma. In the process of markup on the regulatory reform legislation——

Mr. MOAKLEY. I understand the horns of your dilemma.

Mr. KINDNESS. In fact, I sort of seek advice today in a way, because we have not completed that markup, and we have not reached the point in the full Judiciary Committee at which it would be appropriate for that amendment to be offered. If not found to be nongermane, this could possibly be the subject of a vote to include the concept in the regulatory reform bill. Frankly, I don't want to create the condition where there would be a sequential referral of that legislation that might slow it down, but I would very much like to see the three positions juxtaposed to the House that are represented by what is in that regulatory reform bill at the present time which is a complete two-House veto with Presidential signature, but just an expedited procedure, and second, your proposal which would change the House rules to establish the select committee, and third, the inevitable H.R. 1776, Mr. Levitas' legislative veto approach, one and a half-House.

Putting the three to a vote on the House, I think, would put the debate in a very appropriate form. I sort of seek guidance as to whether it is desirable or undesirable at the full Judiciary Committee stage, to propose that amendment; and I would solicit comments on that.

Mr. MOAKLEY. Chairman Danielson indicated it could very well muddy up the waters to consider my bill with H.R. 746. So I would bow to the chairman's judgment. I appreciate the fact that you are willing to offer it. However, after looking at the composition of people who will be voting on that, who may not feel as strongly as you or I do about it, it may be that discretion would be the better part of valor. It probably is best not to offer it at this time.

We may report it out as just a separate bill altogether.

Mr. KINDNESS. I would urge, that if it is appropriate to do so, when the Committee on Rules is dealing with the question of a rule for the regulatory reform bill, I would certainly appreciate the opportunity to urge at that time that the rule make in order your bill, substantially, as an amendment to that.

Mr. MOAKLEY. That would probably be one way of doing it—make my bill in order as an amendment on the floor.

Mr. KINDNESS. To conclude, Mr. Chairman, I simply would hope that that range of ideas could somehow be presented to the House in the debate.

There are great merits, I think, to the Levitas type of legislative veto.

I simply feel that it is more workable for the committee having a specialized jurisdiction, and not tied paternally or fraternally to the programs that have been established, to have this oversight function.

That committee obviously needs to call on the expertise of the committees of substantive jurisdiction, and assure them an opportunity to have an effect on the hearings that are held and the record that is made on a contested regulation, but the control of the process of reviewing administrative regulations should remain in a specialized jurisdiction, I believe.

Mr. **Moakley**. I commend the gentleman for his testimony and our private and public conversations.

I know exactly where you are coming from and I completely agree. If I thought that the joint committee approach had any chance at all of being enacted I would be for it. We could then get rid of a lot of the problems which could arise with a House select committee. Being practical, however, I don't think that there is a chance for a joint committee at this time.

I have not decided what I will do when H.R. 746 does reach the Rules Committee—whether I will make the select committee proposal an amendment to H.R. 746 or treat it as a separate bill somewhere down the line.

Congressman Taylor?

Mr. **Taylor**. Thank you, Mr. Chairman.

I appreciate your remarks.

Tom, do you feel H.R. 746 itself will attain what we want to do?

Mr. **Kindness**. No; I would not feel that way, Mr. Taylor.

I think the improvement of the procedures in the Administrative Procedure Act represented in H.R. 746 will give far better opportunity for public input, that is, for the affected regulated public, but that does not assure that the administrators will respond fully and sympathetically to the often conflicting views with which they are presented. There are policy questions that have to be decided in these regulations many times.

It is to those policy questions that I think the Congress must direct its attention on some occasions.

There has to be a place other than a hidden bureaucratic corner where policy decisions are made finally and subjected to public scrutiny, and I don't think H.R. 746 really addresses that point.

It is procedural only and we have got to get another mechanism for the review of those matters in administrative regulations that become policy questions, really legislative decisions.

Mr. **Taylor**. I would tend to agree with you. It seems to me that H.R. 746, while the thrust of the mission that it sets forth is noble, leaves a lot to be desired because a lot of regulations are pretty open-ended and vague. Who can say that they didn't review the rules, the statutes, and so forth?

It directs them to do it, but I would assume that most regulators that have written the regulations would tell you that they had already done all those things.

Some of us question whether or not they have seriously done it. I am gratified for the fact that you feel this needs further guidance.

I have not had a chance to look at the chairman's position in detail, but I feel very strongly we just can't say to Members of Congress that we are going to avoid, as Mr. Danielson indicated, and he had a good presentation, the responsibilities because we sent it down to the regulators, we don't want it on our backs. We are responsible for it, after all.

We gave them the authority to do it and we cannot divorce ourselves from the action that they might take. The public is not going to stand for that. They are the ones that are going to be affected.

A regulation hits someone pretty hard every day, and we have a responsibility here, as distasteful as it might be. It is something we need to address.

Mr. MOAKLEY. Tom, thank you very much.

It is the understanding of the Chair that Congressman Levitas and Congressman Edwards are on their way, so the subcommittee will stand in recess awaiting the arrival of these two illustrious Members.

[A brief recess was taken.]

Mr. MOAKLEY. The subcommittee wiil now come to order.

The subcommittee is pleased to welcome the Honorable Elliott Levitas, who has emerged as the major spokesman for those favoring the legislative veto. He has devoted a lot of time and energy to consideration of the problem with the current rulemaking process and to what he considers the best solution, the enactment of a generic veto.

STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEVITAS. I would ask that my entire statement be submitted.

Mr. MOAKLEY. Without objection.

Mr. LEVITAS. As I said somewhat facetiously a moment ago, in discussing this issue before your committee, I almost feel I can simply say, oh, No. 3 or No. 4, because we have talked about it so often and I am not going to take your time simply to rehash or restate the points that we have discussed previously.

There are one or two major points that I would like to emphasize. I won't discuss why I think we need a legislative veto. We have said enough.

There is a rather broad-based bipartisan consensus that there is a need for this type of legislative oversight with rejection powers, even though some don't agree all together, but it is fair to say there is a consensus with a majority of the Members of the House and a growing consensus of the Senate.

What I would like to say is that the reason, Mr. Chairman, that I think we need to have a legislative veto rather than a joint resolution, which in my judgment is not a veto—it is simply a means of exercising the legislative process itself—is because once you move to the joint resolution and put the ball back into the executive branch, the effectiveness of the legislative veto aspect has been dissipated.

It is important to realize that this is not an issue between any particular administration and the Congress. This is not something that is directed toward the present administration.

As you know, I was a strong advocate for this position during the last and the preceding administrations. It is an institutional necessity, I think, because there is no President who will ever be able to control his own bureaucracy, and every President who thinks he can finds out in about 2 months or 3 months that the bureaucracies are doing those things they are going to do anyway, and there is no effective way to control that process without a legislative veto, in my opinion.

Second, the legislative veto should not necessarily be considered as an adversarial situation between an administration and the Congress. It would seem to me that a President who knows how to work with the Congress can rely upon and utilize a legislative veto as a means of checking his own bureaucracy, and when he feels strongly about the action being proposed to be taken by the Congress through a legislative veto, he has the opportunity to state his case and to use what powers of persuasion or what have you to accomplish his purposes.

Mr. MOAKLEY. He is doing it right now in the Senate on the AWACS.

Mr. LEVITAS. A classic example. The fact that you have a legislative veto does not mean every legislative veto is going to be exercised successfully, but it does give Congress, as you point out right now, the right to go through this process.

So often, whether it is a reorganization plan or whether it is a foreign arms sales program, whether it is a budget impoundment situation, whether it is regulations such as were to be issued under the gas deregulation bill by FERC, at the time Congress delegates that legislative authority to the President, we just don't know how it will be exercised, what rules will be issued, and in the absence of having a check of this sort we would either turn over the whole ball game to unelected bureaucrats or we will have to write legislation with such rigid specificity that there is not the opportunity to deal with unanticipated problems that arise.

The legislative veto gives us that flexibility and that opportunity.

Now, one of my concerns about having a Mickey Mouse legislative veto or something that does not really end up with a veto is no administration is going to pay a great deal of attention to what Congress says about something, once they have published their regulations. You cannot go out and fight a dragon with a sword that is a piece of limp spaghetti.

You have got to have something that is effective, in the last analysis. The veto that I think is the best approach, the 1½-House veto, is a means of doing that.

Two other points and then I will conclude, or three other points, and I will be brief.

The first is some interest groups feel that a legislative veto gives special interest, however they define special interest, a second crack at something, and that it politicizes the rulemaking process.

First of all, the rulemaking process is politicized already. Anybody who thinks that politics don't enter into the rulemaking process is still living in a dream world. Obviously, it is a politicized process. The politicking is going on down in the agencies downtown.

The difference is that where the Congress gets involved in the rulemaking process through a veto, the politicking is something that comes up openly in the environment where it usually occurs, and it can go either way. It is a two-edge sword.

There are people who, for example, on labor organizations and some environmental groups think that it is simply a carte blanche for business to undo regulations that they don't like.

I can tell you, and you will find this out publicly pretty soon, that there are a lot of big businesses who are equally concerned because they think the environmentalist and consumer groups are going to get a crack at undoing regulations.

Both of them are wrong, and then both of them are right. It is a two-edge sword.

The fact of the matter is that it will come to those of us who are representatives of the public to pass upon what is in effect a law, a regulation which is a law. You go to jail for violating a regulation. We ought to have that responsibility. We represent the people. We are accountable, and if they don't like what we are doing they get a crack at us every 2 years, and that is where the power ought to be.

The constitutional question—I am really not going to get into—because you are almost to the point of asking how many angels can dance on the head of a pin; the Supreme Court will automatically decide that issue.

I don't think the *Chadha* case is the best vehicle.

Mr. MOAKLEY. That case involves an adjudicatory proceeding.

Mr. LEVITAS. Yes; and it really does not focus on this issue, and some of us every time we are opposed to something and run out of other arguments always say it is unconstitutional.

I happen to think it is constitutional. I will tell you that as a lawyer it is clearly a question of controversy, not open and shut. There are as many scholars on one side as the other.

We need to get away for our purpose from that discussion because it can go either way.

The last point, Mr. Chairman, is this, the more than 230 cosponsors of H.R. 1776 plus the additional numbers who have supported this approach when we have taken votes on separate legislative vetoes, I think, indicate what the position of the majority of the House of Representatives is.

This committee frankly has an obligation, a responsibility to let the House vote on this issue.

Even if you disagree with it, I think the many years of overwhelming support by the Members of the House shouldn't be thwarted by any committee.

I have not undertaken to circulate discharge petitions, although I have been urged to do so, because I don't think that is the way it ought to be.

I do think you really do have an obligation to let the Congress vote on this, and my concluding remark is this, I don't think, and I want you to understand that I am not saying I don't like my bill, I do, but it is not the final word on the subject.

I have been discussing this matter with other Members of Congress, of this committee, of other committees, and there are some ways in which I think we can achieve the same effective result with some modifications, even in the approach taken in H.R. 1776.

Hopefully, this administration might even look favorably upon some of those things. But that is their problem, not your problem.

I think we need to decide and let the House vote on a real legislative veto. We ought to do it very shortly.

The Senate is going to be passing one in the near future. I would prefer to see H.R. 1776 or some modified version of it made in order as part of a regulatory reform bill, if not voted on separately as an independent piece of legislation, which I frankly would prefer, but I think it ought to be done, Mr. Chairman.

I have said it to you privately and I say it to you publicly, I really think in light of the many years of overwhelming support that the House has shown for this, it is almost getting to the point of being unfair to deprive the Members of the House the opportunity of expressing themselves on this issue, and I would hope that this committee would in the very short term, not September of next year, but before the end of this year, give us the opportunity in the House to vote on this issue.

Thank you.

[Mr. Levitas' prepared statement follows:]

PREPARED STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, and distinguished members of the subcommittee, I am happy to be here today to testify before your subcommittee on the issue of legislative veto. This certainly will not be the first time most of you have heard me, or some of our other colleagues address this issue; for discussions on legislative veto have been taking place before this committee, in both houses of Congress, and across the Nation for a good many years.

Perhaps these hearings today can mark the culmination of these discussions, and mark the beginning of action on the subject. I believe the time for talking has come to an end, and the time for action is now.

Support for the legislative veto is strong and unwavering. Most of you are familiar with my bill, H.R. 1776, which has been cosponsored by over 230 Members of the House of Representatives. This legislation, which is one of the measures being considered by this subcommittee, would provide for congressional veto of rules and regulations promulgated by the executive and independent regulatory agencies.

The arguments in support of the legislative veto have not changed. If anything, as each year passes without its enactment, the arguments in its favor become more persuasive and support for it grows within Congress and the general public. That is especially true in light of last November's elections. The American people have demanded a return to representative government. They have given us a mandate to move away from a government of unelected bureaucrats who rule by administrative fiat.

At the heart of this issue of congressional veto of administrative rules and regulations is the question: Who makes the laws in this country—the elected Representatives of the people or the unelected bureaucrats?

As Members of Congress viewing this subject, we must remember that administrative rules and regulations are, in effect, laws. They have the same force and effect as laws. If a person violates an act of Congress which is criminal in nature, he is arrested by a Federal official, brought before a Federal court for trial and, if convicted, sentenced by a Federal judge to serve time in prison or to pay a fine. The exact same is true if a citizen violates an administrative rule, written by a bureaucrat who is elected by no one and is responsible only to the agency head. The ultimate test of what something is, is not its name, but its effect. Administrative rules and regulations are laws. We must not forget that fact. The question becomes then: Are we going to continue to let unelected bureaucrats continue to pass laws without effective congressional control?

Our Founding Fathers would be shocked to see us struggling so with laws passed by the executive branch and independent agencies. The principle for which they fought was control over executive and bureaucratic power by the people through their elected Representatives. It was no accident that I chose H.R. 1776 as the number under which I introduced this bill. One of the many grievances enumerated against King George in the Declaration of Independence was, "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."

One has only to glance at the daily Federal Register to realize that the executive and independent agencies have evolved into a fourth branch of government with hosts of regulations which carry the force of law without legislative consideration. While it may be true that Congress has previously given—or abandoned—to the bureaucracy the power to enact these administrative laws, that does not justify an unmitigated continuation of this practice.

There is clearly a need to have administrative rules to fill in the gaps between the broad principles embodied in acts of Congress, but this does not mean that Congress should leave it to civil servants or appointed officials to pass thousands upon thousands of far-reaching rules that can put citizens in jeopardy of losing liberty or property without having anyone elected by the people or answerable to them involved in the process.

Remedying legislation can, of course, be introduced, but we know too well that this is a cumbersome and time-consuming process which is not adequate to repeal or change administrative rules. Also, why should the full mechanism of enacting laws be required to reject mere agency rules?

This is the major problem I see with the proposal set forth by Chairman Moakley in his bill, H.R. 1, and by Congressman Danielson in his bill, H.R. 746. The only mechanism for overturning regulations which may be unreasonable, or arbitrary, or which may go beyond the intent of Congress, is a joint resolution of disapproval. A joint resolution must be passed by both Houses of Congress and signed by the President. This is not a legislative veto at all. To describe it as a "legislative veto" is pure sham. This provision would merely authorize Congress to do what it is already authorized to do. The procedure with a joint resolution is the full legislative process.

As you know, Congressman Lott has come forward with a proposal which is a vast improvement over the proposals which call for a "veto" of any rules and regulations by passing a joint resolution of disapproval. The Lott approach is certainly a step in the right direction, and it can provide the basis for the genuine regulatory reform we need. The Lott proposal covers independent agencies and to a limited extent executive agency regulations. But we need to go further, and I am happy to say that Congressman Lott and I are working to develop a compromise which will result in a more meaningful legislative veto proposal.

The enactment of a true legislative veto, such as that embodied in H.R. 1776, will give the people, through their elected Representatives, input into and control over the rules which govern their lives.

H.R. 1776 would add a new chapter 6 to the Administrative Procedures Act setting forth an on-going procedure whereby Congress may review and if necessary reject agency rules—a mechanism that is essential to insure that the principles upon which our country was founded are upheld.

The procedure in H.R. 1776 sets an outside time limit of 90 calendar days of continuous session from the time of final promulgation for congressional consideration of a rule. A rule shall not become effective if either (1) within this period both Houses adopt a concurrent resolution of disapproval, or (2) if within 60 calendar days of continuous session after promulgation, one House adopts a resolution of disapproval and that resolution is not itself disapproved by the other House within 30 days of continuous session following its transfer to that body.

If, however, after 60 calendar days of continuous session, no committee of either house has reported or been discharged from further consideration of a concurrent disapproval resolution and neither house has adopted a resolution, the rule may go into effect immediately.

Under H.R. 1776, resolutions of disapproval will be referred to the standing committee with oversight and legislative responsibility for the promulgating agency. If a committee to which is referred a resolution of disapproval which has not been adopted by the other house does not report out such resolution within 45 calendar days of continuous session after referral, the committee may be discharged from further consideration. Also, if a committee to which is referred a resolution which has been adopted by the other house does not report out the resolution within 15 calendar days of continuous session, the committee may be discharged from further consideration. A motion to discharge will be highly privileged and must be supported by one-fifth of the Members of the particular house.

H.R. 1776 applies the congressional veto to all rules and regulations, excluding emergency rules which may go into effect immediately but may be subject to subsequent review. It also contains, in section 603, a procedure whereby Congress may direct the promulgating agency to reconsider rules and regulations, including those previously adopted. This section provides that if a resolution of reconsideration is adopted by either House within 90 calendar days of continuous session after promulgation, a new rule will not go into effect and the agency must then reconsider the rule and within 60 days either withdraw or repromulgate, or it will lapse. For previously adopted regulations, if after 180 days of passage of a resolution of reconsideration the rule has not been repromulgated, the rule shall lapse. Prior to 60 days before repromulgation, the agency must give notice of the repromulgation proceedings. Rules repromulgated are subject to the congressional veto procedure previously described.

I want to take this opportunity to point out that H.R. 1776 is identical to legislation, H.R. 12048, actually reported favorably by the House Judiciary Committee during the 94th Congress. The House Judiciary bill was considered by the House under suspension of the rules and just narrowly missed receiving the two-thirds favorable vote required for passage by only two votes. That final vote was 265 to 135.

The procedure for legislative veto set forth in H.R. 1776 strikes the fine balance of giving Congress the opportunity to consider and reject ill-advised regulations without unnecessarily delaying the operation of the executive branch and independent agencies. The process provides sufficient time for Congress to deal with even difficult regulations without bottlenecking the rulemaking process. In addition, while some have described this as a one-House veto, it is not, since both Houses of Congress could participate in the process. The virtue of this procedure is that it prevents one House from thwarting the will of the other House by inaction, while allowing one body to block a veto of a regulation if it believes that is the correct course.

I would also like to point out two other features of this legislation which I believe are significant to the subcommittee's consideration. First, there is a provision in H.R. 1776 that specifically states that congressional rejection or inaction on resolutions of disapproval shall not be deemed an expression of approval for the purpose of judicial review. And, second, H.R. 1776 provides for a termination date, or sunset, of this authority at the adjournment sine die of the 99th Congress, so that Congress may have the opportunity to review the process, see how it works and then specifically reauthorize it, if it so chooses.

H.R. 1776 has had majority support, bipartisan support, for a number of years. But the legislative veto was blocked last year at the end of the session by the Carter administration. In so doing, the Carter administration blocked their own regulatory reform bill, H.R. 3263. That bill was to be the centerpiece of the Carter administration's program to streamline, modernize, and reform our Government, but the Carter administration sabotaged it last year because it would have included a legislative veto.

In May 1980, the Judiciary Committee was considering H.R. 3263. Because amendments were offered to the bill to provide for a legislative veto, the Carter administration pigeonholed the bill in committee, and the final day of markup was not held until September. The Carter administration allowed the bill to be reported out with a provision allowing disapproval of regulations by a joint resolution of disapproval. During the final day of markup, several members of the Judiciary Committee made it clear that they were voting to report the bill favorably only because they understood that it would be amended on the floor of the House to provide for a real legislative veto—the procedures of H.R. 1776.

The time has come for the enactment of his legislation. It deserves the support of President Reagan. I believe him to be a man of his word and one who keeps his promises. This issue—the enactment of a legislative veto—will give President Reagan the opportunity to demonstrate that he backs up his words with action. The 1980 Republican National Convention Platform was clear in its support of the legislative veto. The document stated that:

"The unremitting delegation of authority to the rulemakers by successive Democratic Congresses and the abuse of that authority have led to our current crises of over-regulation. For that reason, we support use of the Congressional veto * * * as a means of eliminating unnecessary spending and regulations."

President Reagan underscored his commitment to the legislative veto with statements that he personally made.

During last fall's campaign he spoke on October 8, 1980, in Youngstown, Ohio, on the subject of regulatory reform. He said there, clearly, directly, and unequivocally:

"To better control the growth of Federal regulations, we should * * * give both Congress and the President greater authority to veto regulations approved by *executive agencies*. [Emphasis added.]

Unfortunately for Mr. Reagan, however, some officials in his administration are contradicting what he has said on the subject of legislative veto. For example, James C. Miller III, of the Office of Management and Budget, and soon to take over as Chairman of the Federal Trade Commission, said in testimony before the House Judiciary Subcommittee on Administrative Law and Governmental Relations, on May 7, 1981:

"However, it [the Administration] would be compelled to *oppose any Congressional veto* that applied to *Executive* Branch agencies." (Emphasis added.)

That directly contradicts Mr. Reagan's campaign statement.

It is very important that a meaningful legislative veto apply to executive branch agencies as well as to independent agencies. According to sources at the Congressional Research Service, executive agencies issue approximately 75 percent of all government rules and regulations. Independent agencies issue 25 percent.

I share the hope expressed by David Stockman in his confirmation hearings as Director of the Office of Management and Budget last January 8. During the course of those hearings, Mr. Stockman said in response to a question about the campaign commitment on the issue of legislative veto that he "would expect that that pledge, like many others, will be fulfilled." I hope that Mr. Stockman is right, because I share his opinion, also expressed in the January 8 hearings, that the legislative veto is "an imperative, necessary idea."

There is no doubt in my mind that when the Republican Convention adopted its platform, it was talking about the type of legislative veto in H.R. 1776, and that's what it was supporting. When President Reagan made his address in Youngstown last October, he was endorsing this type of legislative veto over executive and independent agency rule making. In August 1979, Mr. Reagan, as he then was, wrote a column on the legislative veto, which I would like to make a part of the record. In that column, Mr. Reagan specifically identified an amendment sponsored by Senator Harrison Schmitt to the Federal Trade Commission authorization legislation and specifically identified my efforts in the House.

A form of legislative veto over regulations promulgated by the FTC, which Mr. Reagan referred to in his column, was finally passed by both Houses and signed into law by President Carter in May 1980. During the course of the long and protracted battle in Congress over this legislative veto amendment, I received a letter from Judge Lee Loevinger. Judge Loevinger, with his background and experience in government, including service as a Commissioner at the FCC, is an able proponent of the legislative veto. In referring to the actual usage of the legislative veto in connection with the FTC, Judge Loevinger said:

"* * * I must admit to considerable doubt that the congressional veto will be exercised often or effectively. However, its mere existence may have some salutory effect in restraining the FTC and its staff * * *. This limited and reasonable step toward providing a warranted restraint on the legislative action of the FTC appears to be entirely reasonable."

Judge Loevinger's predictions have been proven correct after the first year of the legislative veto being in place for the FTC. Just last April the Commission was revising its first major rule since the legislative veto provision in its authorization bill was enacted. The Commission had received a letter last fall signed by 53 Senators protesting a proposal to regulate used-car dealers. Subsequently, the FTC was reminded of this by a letter from Senator Baker. As a result, the Commission made some major changes in the proposed rule. One FTC Commissioner commented that "I don't think there's much point in our sending something to the Hill that's obviously headed for the trash can." As Judge Loevinger predicted, the Federal Trade Commission became accountable even before a resolution of disapproval had been introduced.

The legislative veto would also force Congress to draft legislation more carefully and to spell out its intent more clearly. Congress is a major part of the problem we have with regulations today. We are far too lax in delegating authority broadly and without sufficient guidelines to administrative agencies. When hard decisions have to be made, we pass the buck to agencies with vaguely worded statutes. Who can or should vote against safe cars, clean air or nondiscrimination? But, when the implementing regulations are published loading cars up with expensive equipment of little benefit, or EPA imposes a parking ban on cities, or EEOC refuses to let a police department ask potential employees if they have a criminal record, the actual benefit of safe cars, clean air or nondiscrimination is called into question. If we realize that we have the ultimate responsibility for the administrative rules that flow from these enabling acts, we will be more careful. It's our responsibility to fill—not pass the buck.

Moreover, the public will have a larger voice in the rulemaking process. Access to Congressmen and Senators is far easier than access to anonymous, faceless bureaucrats. Most Federal administrators are hard-working, dedicated, and talented people who conscientiously do their jobs and serve the public faithfully and well. Some few, however, are zealots who in some elitist way think they—not the people or the elected Congress—run the country. The purpose of congressional veto is to deal with this problem and to see that the public is given an input, through their elected Representatives, in the promulgation of administrative rules and regulations. That is why so many organizations and individual citizens support this idea—because it gives them a say-so in the rules that run their lives. It provides a remedy to the citizens of this country for us, as their elected Representatives, to say when the bureaucracy has gone too far, perverted the intent of Congress and promulgated arbitrary and oppressive rules.

Congressional veto of administrative rules and regulations is not a startling new proposal. There is ample precedent for such action in both Federal and State law. Since 1932, approximately 186 different acts of Congress with 264 separate provisions mandating some sort of congressional approval or disapproval of executive implementation of those laws have been passed. Thirty-five States have on their books laws which provide for legislative review and/or veto of administrative rules and regulations. The National Association of State Legislatures has, in fact, recommended enactment of such laws to those States which do not have them.

Congress not only has repeatedly provided for congressional veto of administrative rules and regulations, but has also exercised that power. For example, on September 14, 1976, the House approved a resolution, H. Res. 1505, vetoing certain regulations of the General Services Administration pursuant to the Presidential Recording and Materials Preservation Act which provided for this very type of congressional veto. The Congressional Research Service has identified 66 resolutions of disapproval that were approved by the 94th and 95th Congresses, out of the 519 that were introduced.

And more recently, in 1980, the House acted to veto regulations promulgated by the Federal Energy Regulatory Commission under the Natural Gas Policy Act of 1978, and acted with the Senate to veto President Carter's oil import fee, and, on four separate occasions, acted to veto regulations of the Department of Education.

The Congressional Research Service of the Library of Congress has conducted a series of studies on the exercise of the congressional veto. Based upon the use of the legislative veto under existing laws since 1960, the studies conclude that the legislative veto "has not caused serious disruption of Congressional-Executive relationship."

I would like at this point to spend time addressing the objections that have been raised against legislative veto of administrative rules and regulations. These have ranged from questions concerning its constitutionality and its practical implementation to whether it is good policy or not.

In addressing the constitutionality of the legislative veto, let me say at the outset that this has been a thorny question since the device was first enacted in 1932. Many legal scholars far more learned in constitutional law than you or I have dwelt upon this question. They have studied the nuances of the Constitution and the legislative veto for years, and the result has been a stack of books and law review articles asserting the constitutionality of the legislative veto, matched by a stack of books and law review articles equal in size asserting its unconstitutionality. I dare say that nothing that may be said at this hearing or any subsequent hearing will shed any further light on the issue of the constitutionality of the legislative veto. The fact of the matter is that the Supreme Court is the only body that is able to settle this question. Any discussion of it is mere speculation as to how the Supreme Court may rule.

I am personally of the view that the Supreme Court will uphold the constitutionality of the legislative veto I think it is a "through a looking-glass" approach to suggest that the legislative veto violates the constitutional principle of separation of powers. How can the legislative branch invade executive powers by reviewing legislative decisions simply because they are called regulations instead of laws? If anything, the thousands of rules/laws passed by the bureaucrats in the executive branch invade the legislative powers of Congress. Certainly, Congress delegated rulemaking authority to the executive branch agencies, but the separation of powers doctrine does not preclude that the delegation be absolute and cannot be conditioned by legislative enacted according to the constitutional design. In short, if Congress has the power to delegate rulemaking authority, it is axiomatic that it can delegate all that power, or it can condition or limit that delegated power by making it subject to a congressional veto. The far more serious question of whether Congress can delegate legislative powers to the executive branch under the Constitution was decided decades ago by the Supreme Court. Conditioning that delegation of power is merely a corollary to a well established principle.

The legislative veto does not violate the Presentment Clause or the principle of bicameralism because it is not legislation. It is simply a maintaining of the status quo. It is the same as if a bill were introduced and it did not pass both Houses of Congress, or if an appropriation were recommended and did not get passed. It is not changing the law.

The recent ruling by the Ninth Circuit Court of Appeals in the case of *Chadha* v. *Immigration and Naturalization Service* does not deal with the issue. The Ninth Circuit ruled in that case that a one-House rejection of the Attorney General's suspension of a deportation order was unconstitutional. The court was careful to confine its decision to the facts before it in that case. The court viewed the *Chadha* case as involving a legislative rejection of a quasi-judicial determination properly administered by the executive branch and properly reviewable by the judicial branch. The Ninth Circuit did not address, and expressly avoided addressing, the issue of the constitutionality of a legislative veto over quasi-legislative powers—administrative rulemaking—that would be subject to a legislative veto under the legislation now before this Subcommittee.

The Court of Claims in *Atkins* v. *U.S.* confirmed the validity of the one-House veto over delegated quasi-legislative powers in the Federal Salary Act. The *Atkins* court ruled—

"* * * that the one-House veto present in the Salary Act is a device authorized by Article I, Section I, coupled with the necessary and proper clause, and that it contravenes neither the broad principle of separation of powers nor any specific provision in the Constitution. In particular, we note that the necessary and proper clause, which has sanctioned the massive delegation of legislative functions over the past century, provides firm grounding for this legislative veto."

The decision by the Court of Claims in *Atkins* was necessarily prescribed to the legislative veto in the Federal Salary Act. Yet, the court upheld the constitutionality of this legislative veto with language that would be readily applicable to a constitutional challenge to the legislation before you.

I will be the first to admit that a decision by the Court of Claims cannot be deemed a harbinger of how the Supreme Court will rule. More significantly, though, when the *Atkins* decision was appealed to the Supreme Court, the Supreme Court allowed it to stand. When given the opportunity to reverse the court decision on what has obviously been a troublesome question about which legal scholars have waited for decades for a decision, the Supreme Court refused to consider it and let the Court of Claims decision upholding the constitutionality of the legislative veto stand.

You may speculate that the Supreme Court is trying to avoid the issue. The Court has had ample opportunity to make a ruling on the constitutionality of the legislative veto in the past. I would like to point out, though that an adverse ruling by the Supreme Court may affect over 185 statutes, many of which are very significant laws such as the War Powers Resolution, and the Budget Control and Impoundment Act. Thus, there is good reason for the Court to move cautiously.

The only word from the Supreme Court on this issue has come *in dicta* by Justice White in *Buckley* v. *Valeo* concerning the Federal Election Commission. The Supreme Court, as you may recall, held the original campaign reform measure unconstitutional because of the manner in which FEC commissioners were appointed, without addressing the question of the constitutionality of congressional disapproval of FEC regulations. Justice White, however, took up the issue, and in strongly worded dicta, declared that if the commissioners were constitutionally appointed, the veto device would be constitutional. He said:

"I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered infirm as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress."

Justice White also said:

"* * * in light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the Constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto."

Other cases involving the question of the constitutionality of the legislative veto are winding their way through the judicial process and will eventually come to the Supreme Court. Whether the Supreme Court will choose to hear them remains to be seen. I think that we need a decision on this issue and, hopefully, an appropriate case will be found. The legislative veto provision that is contained in the FTC Improvements Act of 1980, Public Law 96-252, includes a section providing for expedited judicial review.

In supporting the constitutionality of the legislative veto, Justice White refers to "modern reality" and uses it as a departure point from which he continues his assertion. Modern reality is what Congress deals with. While I do not mean to imply that the constitutional question is not significant and Congress should not tread cautiously, we also must deal with reality. If we simply dwell on the debating points of the constitutionality of the legislative veto, I suspect that the debate would be called a tie. We should not get caught on the horns of the constitutional dilemma and not deal with the reality of the regulatory morass in which the citizens of this country find themselves. In this instance, it is political soft-shoe to hide behind a constitutional issue that, at worst, is an open question. Incidentally, former Attorney General Griffin Bell and others before him said that the legislative veto is constitutional in reorganization legislation.

Legislative veto of government regulations deals with this reality. It is good policy because it provides for accountability. It makes Congress responsible for its actions. I frankly do not understand the argument some opponents make that legislative veto of regulations makes it easier for Congress to pass the buck. If we have the ultimate responsibility for the regulations which flow from the laws which we pass through the exercise of legislative veto, how can that be considered passing the buck?

Legislative veto of administrative rules and regulations forces Congress to face up to a difficult task. It is much easier to pass legislation with broad mandates and not ever deal with the difficult decisions. In a debate on a legislative veto amendment, one of our colleagues said in a moment of refreshing candor, "Do you understand what the passage of this amendment would mean? It means we have got to assume the responsibility for these regulations." That is precisely the point.

If Congress, the elected Representatives of the people, is not responsible for the regulations which are the result of our legislative actions, who is? The President certainly is not. Besides the real practical problems of not being able to control his own bureaucracy, the President has had legal problems in trying to get some control over the regulations which his executive branch promulgates. President Carter was twice taken to court because he tried, through his appointees, to exercise his influence over regulations proposed by the Environmental Protection Agency on ozone standards, and proposed strip mining regulations promulgated by the Department of Interior. The briefs that were filed in these cases maintained that since the legislation authorized the Administrator of the Environmental Protection Agency and the Secretary of Interior to promulgate regulations on these matters, the President has no role to play other than submitting comments during the normal comment period.

Even an elected President cannot control bureaucratic rulemaking practices. If the President cannot exert effective control over executive regulations, just imagine the sort of control he is able to exert over the independent regulatory authorities. He has no control in theory or in practice. He cannot even direct the independent regulatory authorities to write regulations in plain English. These independent regulatory authorities operate as free-wheeling mini-legislatures. Without Presidential control or congressional control, they have all the independence of the judiciary with the added power to legislate through regulatory decision.

President Reagan has taken a positive step towards exercising some control over regulations with his Executive Order 12291, issued on February 17, 1981, and he is to be commended for the effort. However, the Executive order has its limitations. Under the Executive order and the Paperwork Reduction Act, the Office of Management and Budget can delay the implementation of a regulation that is too costly or that creates an unreasonable paperwork burden. But the OMB, the Vice President's Task Force on Regulatory Relief, and the President himself, are without the power to stop a regulation from being promulgated by an agency. And, the Executive order only applies to executive, and not independent, agencies. And, because it is non-statutory, it can be revoked by this administration or subsequent administrations at any time. That is why we need the legislative veto, so that we can—as David Stockman suggested in his confirmation hearings—work together with the President in reducing the regulatory burden.

If the Congress cannot exercise control over government regulations, and the President cannot exercise control, who then do the American people have who is accountable to them to look after their interests?

The answer, unfortunately, is no one who is elected by them. That is why so many of your constituents support this proposal for legislative veto of government regulations. They want someone who is accountable to them to exercise control over the bureaucracy and the thousands of regulations it promulgates.

Furthermore, we must remember, we are legislating not just for this administration, but also for the ones to follow. There can be no misunderstanding of the present administration's genuine commitment to regulatory reform. Some future administration, however, might not be so concerned about the regulatory process. History has demonstrated that different administrations place different emphasis on their various responsibilities.

You are no doubt aware of the study that was done by Professors Bruff and Gellhorn for the Administrative Law Conference on the operation of five legislative vetoes of regulations previously enacted. The study itself is interesting and instructive; the conclusions drawn from it are judgments made by the authors. Contrary conclusions can just as easily be drawn. In my judgment, Professors Bruff and Gellhorn seem to have trepidations about the political process. They are concerned that regulations will be made in the same way (heaven forbid!) that laws are made. They seem to say, "Look at what a mess Congress makes in passing laws. Look at all the back-room politicking that goes on with Congressmen and their staffs. Let's keep rulemaking above all of that."

I happen to disagree. Although the legislative process is not perfect, it is an open and accountable process. You can pick up the Congressional Record each day and see just how each Congressman has voted on an issue. It is, of course, a process of compromise and selectivity. Some bills get considered and others don't. The House gets its way on one issue in conference committee, and the Senate gets its way on another. This is representative democracy, like it or not.

To keep rulemaking out of this, even though it is really right in its midst though not as open, is to say that what we really want is an elitist philosopher king. The bureaucrats know much better than the elected Representatives of the people—that is their thesis. They simply don't believe in the democratic representative system.

Professors Bruff and Gellhorn are also concerned that legislative veto of regulations will decrease public participation in the rulemaking process. They say that instead of participating in the comment period, the public will avail themselves of the opportunity to contact their Congressmen when they are concerned about a regulation. The promulgating agency will no longer have the benefit of public input. I have often wondered how much attention the agencies have ever paid to public comments in the first place. They are not accountable to the public. If the public feels that the bureaucracy is so unresponsive to their concerns and that Congress will be more responsive, I think that this makes for a strong argument in favor of the legislative veto. However, that won't be the case, since most regulations will be permitted to go into effect. The public will not want to lose its chance in the administrative process, but it should not be denied its right to have elected officials make the final decisions on laws. As far as public participation is concerned, it is clearly available to any citizen through his Senator or Representative and he doesn't even need a lawyer.

In addition to these concerns, many questions have been raised about the practical considerations of enacting legislative veto of government regulations. Charges have been levelled that it will overwhelm Congress so that little else is done except to review regulations; that it will substantially increase the number of congressional staffers and unduly delay the implementation of worthwhile programs; that it will politicize the Federal agencies and allow a second bite at the apple for interest groups when they fail to stop passage of the enabling legislation. However, if we look to the experience of the many States which have laws providing for legislative veto of executive regulations, these concerns are greatly exaggerated.

Let me point out that many of the States, such as Tennessee, Montana, Vermont, and Connecticut, do not have legislatures which meet year-round and certainly do not have staff resources that are even vaguely comparable to Congress. For example, the State legislature in Montana meets for 3 months a year. In the 1977 session, approximately 600 administrative rules and regulations were promulgated and reviewed. Five vetoes were introduced in the legislature and two were enacted.

In a study my staff did on 10 State legislatures which had legislative veto laws, the experience of Montana with only two vetoes enacted after the review of approximately 600 regulations was not unique. All of the States reported that the veto was used sparingly. Connecticut reported the highest usage of the legislative veto back in 1974, when 23 regulations were vetoed in their entirety of 159 regulations reviewed. In 1976, the Connecticut legislature considered 129 regulations and vetoed three.

Michigan has the oldest legislative veto law in the country, originally enacted in 1947. The regulatory review is performed by a Joint Committee on Administrative Rules which recommends suspension of a regulation that must be upheld by concurrent resolution of the legislature. In 1976, one regulation was vetoed by the legislature; in 1975, none were. The counsel for the committee maintained that just the existence of the review committee was a major element of power over the agencies.

I do not believe that the congressional experience with legislative veto of administrative rules and regulations will be that much different from the States'. Only those regulations which are far-reaching, oppressive or clearly exceeding the intent of Congress will receive consideration. Congressional veto of administrative rules and regulations will not overwhelm Congress or create unreasonable administrative burdens and delay. This line of argument is begging the question. These rules and regulations can be as far-reaching in effect as laws, and we cannot let them go by without scrutiny because they are not called such. I would say, and suspect that many of you would agree, that some of the bills we consider are not as significant in effect as the regulations we ignore simply because they are called regulations.

Let me point out that in the 95th Congress, over 18,000 bills were introduced for consideration. This amount was almost two and a half times the number of rules and regulations promulgated. Only those bills and resolutions which were important and necessary were considered in committee and eventually received attention by Congress. It is a process of selectivity. Such would be the case with congressional review of administrative regulations.

In addition, committees already have review and investigations subcommittees with the responsibility of monitoring a particular function of the bureaucracy. The staffs of these subcommittees review the activities of the Federal agencies every day, as well as review the regulations promulgated by the agencies. I would be amazed if any subcommittee chairman would appear before you to say that once his legislation has gotten through Congress, his staff does not check to see how the legislation is being implemented by regulation. The problem is they cannot do anything effectively about the bad regulations, except perhaps to write a letter to the agency in the chairman's name. As you know, that does not necessarily guarantee that the regulations will be changed. Congressional veto will be an asset to oversight activities in that it will help the committee staffs to focus on problem areas without allowing the administrative excess or abuse to continue while long-range oversight activities get underway. It will not add to staff size, but will make them function more effectively.

Delaying the effective date of regulations for 60 to 90 days is not going to bring agency activities to a grinding halt, or even a slow chug. A 60- to 90-day waiting period is a small price to pay if it can better insure that the regulations are in accord with congressional intent and forestall the even further delay of judicial review. The agencies, themselves, sometimes have incredible problems in promulgating rules and regulations. The enabling legislation may have been passed for a year or more before regulations are published. One agency, for example, took almost 18 years to draw a regulation determining how many peanuts must be in peanut butter.

I do not see how Congress can be accused of delay should we choose to review the regulations for 60 to 90 days in order to see that they are done right, when the agencies are far more vulnerable to this criticism.

As far as politicizing the Federal agencies is concerned, I think it is naive to say that the Federal agencies are not now "politicized." Rulemaking involves legislative decisions, and most legislative decisions are political. You cannot take politics out of politics. Certainly, the agencies are subject to political pressures from within, as well as from outside the executive branch.

Moreover, the agencies are presently being "lobbied" by special interest groups, just like Congress, but it is not out in the light of day. The relationship between the regulatory agencies and certain industries can be described as "cozy," particularly with "revolving door" employment which these agencies and industries have practiced in the past. Congress is accustomed to lobbying and its pressures, and stands accountable to the voters. The agencies are, legitimately, not.

Congressional review of regulations removes these sorts of threats and restores citizen input into the rulemaking process through their elected Representatives. With respect to lobbyists having a second chance, there is no reason to believe that lobbyists will be any more successful in getting their views accepted during the review period than they were during consideration of the enabling legislation. Providing for legislative veto of government regulations does not address the concerns of any one interest group over another. It will work both ways. Sometimes one group may win and sometimes another. No one has a better chance than another.

Before closing I would like to point out that there are changes which could be made in this legislation. The procedure spelled out in H.R. 1776 may be fine-tuned. For example, we may want to consider a mechanism through which non-controversial regulations may be quickly disposed and take effect. In addition, I would consider adding a provision for expedited judicial consideration.

Legislative veto of administrative rules and regulations is a way to make a start toward restoring to the people those rights for which the Declaration of Independence spoke over 200 years ago. It is our chance to restore their confidence in their own government. If we truly believe in a system of government by the people, our support of this principle is a way to make our words and beliefs match our votes and deeds. I urge your favorable consideration of the legislative veto concept of H.R. 1776.

The time for talking about this issue is over. The time for action is now.

[From the Jewish Press Magazine Section, Aug. 10, 1979]

NAILING THE REGULATOR

(By Ronald Reagan)

The Federal Trade Commission, one of Washington's most aggressive regulatory agencies (some have dubbed it the "national nanny"), may get its ears pinned back by the Senate in the next few days.

It hasn't attracted much press attention, but an amendment to the budget authorization bill for the FTC would give Congress a "legislative veto" over rulings by the regulators.

Specifically, the amendment, sponsored by Senator Harrison Schmitt, R-NM., would give Congress the authority to intervene in FTC rulings within 60 days after they are announced. If it didn't act within that time, the ruling (on, say, such things as children's television advertising—subject now being debated by the FTC) would stand.

The idea isn't a new one. It began in 1932 when Herbert Hoover was president. In the Legislative Appropriation act that year, Congress gave Hoover the green light to reorganize the executive branch of the federal government, but with the specifics subject to disapproval by either house.

In the 47 years since, Congress has passed 159 acts containing 214 separate, specific provisions giving itself "legislative veto" review power. More than half of these have been enacted since 1970, so the popularity of the idea is growing.

"Frustration" and the "anti-Big Government" mood of the nation are often given by both advocates and opponents of the legislative veto as major reasons of its popularity. "There is an increasing frustration over the lack of control of these agencies. Everybody has a regulatory horror story to tell," Sen. Schmitt says.

Bureaucrats and their allies among the Ralph Nader network and other self-styled "public interest" groups are in a tizzy over the possibility that the Senate may pass the measure tightening control over the FTC, Having gotten used to having a hand in deciding what's best for us all, they are—well—uncomfortable about, losing their clout.

Ironically, opponents of the legislative veto complain that it would "politicize" the regulatory process. One bureaucrat recently said, "The total dynamic of rule-making will suffer. . . . Our process will become a political one as we attempt to build a political record to bring before the Hill."

Funny, but that sounds as if he means the regulators will have to be more sensitive to the mood of the people, just as members of Congress are. Since bureaucrats aren't elected, holding them more accountable than they have been sounds like a pretty good idea in this constitutional republic of ours.

Even if the Senate should defeat the Schmitt amendment (and predictions are that the vote will be close, either way), the legislative veto seems to be an idea which is gathering the momentum of a snowball rolling downhill.

An FTC official has conceded that his agency has written off the House, where Rep. Elliott H. Levitas, D-Ga., has made the subject his "Number 1 priority." He says, "It has finally dawned on most people that government has gone beyond their control. These agency people are actually making laws and they're not accountable to anyone."

Rep. Levitas' ire stems from a 1974 incident when an arrogant FTC bureaucrat informed some Levitas constituents that he wasn't interested in their views, he had already made up his mind.

Mr. MOAKLEY. I thank the gentleman, and I commend the gentleman for actually bringing the legislative veto issue to the House, because I think if anybody is identified with the legislative veto, the gentleman testifying is probably the foremost authority in the House. We have talked about it and disagreed on some facets of it.

My understanding now is that the administration has changed its mind on the legislative veto.

Mr. LEVITAS. By the administration, you mean the President?

Mr. Moakley. Or those people who are charged with looking at his regulatory agencies.

Mr. Levitas. I am getting a lot of different signals from the administration.

Jim Miller, before he went to the FTC, had testified one way.

David Stockman has said several things on the subject during his confirmation hearings. By the way, he was a former cosponsor of H.R. 1776, and he reaffirmed his support of it.

The administration has indicated in some of their testimony a backing off on the legislative veto. I have within the last 2 or 3 weeks received some indications from the White House that they are now raising the question to the highest levels for reconsideration of the backing off, and I am very optimistic about that and I will tell you why I am.

While I may disagree with some of the things that President Reagan has proposed, one of the things that I have found is that on specific major issues where he made a flat-out campaign promise, even if in retrospect, he may not really agree with it, he stuck by his promises.

Mr. Moakley. I don't think the professional air traffic controllers would agree with you.

Mr. Levitas. I am very familiar with that.

What he said to the PATCO people quite frankly was closer to what the Delphic Oracle might have said.

It all depends how you read it. He said he really would like to see something done about their problems.

Mr. Taylor. I thought he told them he would fire them if they went on strike.

Mr. Moakley. No; we are talking about what the President told PATCO members before the election.

Mr. Levitas. I am talking about a specific promise.

Have you read what President Reagan said about legislative veto when he was a candidate?

He made a speech on regulatory reform, in Youngstown, Ohio, on October 8, 1980. That was 1 month before the election. These are his words, "To better control the growth of Federal regulations, we should give," I will paraphrase now, but it is here, "we should give Congress greater authority to veto regulations approved by executive agencies."

The words "executive agencies" is underlined in my copy of this, and the reason is, Mr. Miller, whom I referred to before, when he testified later, he said, "the administration would be compelled to oppose any legislative veto applied to executive branch agencies."

I was attempted to ask the question, who is in charge, is it Miller or President Reagan? President Reagan clearly took a very firm position on the question of legislative veto on executive agencies by Congress, and I don't think he is going to back off on that.

Once that issue gets to him, they may want to deal with some of the procedural aspects, but I don't think he will break his word, I really don't.

Mr. Moakley. Maybe the handwriting is on the wall. Trent Lott has introduced a bill which provides for legislative veto of an executive agency's rules by joint resolutions and veto of an independent agency's rule by concurrent resolution.

Do you think there is such a clear distinction between executive and independent agencies?

Mr. **Levitas**. I think you can make a distinction, but I don't think a joint resolution is an acceptable procedure under any circumstances.

If you go back and read the Republican platform——

Mr. **Moakley**. I had trouble reading the Democratic platform.

Mr. **Levitas**. When they endorsed the legislative veto, they were talking about the type of legislative veto which it embodied in H.R. 1776. There is no question about it.

There are people in the administration who were in the last administration, the people at the Justice Department who have been there since day one who have been opposed to it, and they don't care who is President, they are opposed to it.

I can only tell you my belief, that when it finally gets to Ronald Reagan and the issue is put to him, he is going to say, "This is what I supported, this is what I stand for, and that is what we are going to do."

Not only does that happen because of his philosophic commitment to it, but also, and this is what I can't get through some of my Democratic colleagues' heads, this is a two-edged sword, not pro-business, pro-labor, et cetera.

The bureaucracy outlives us all. They outlive any administration. I wrote a letter to OMB when President Ford was around, to the Public Works Committee.

I got an answer back from OMB which was, I thought, crazy. I spoke to the new administration, Bert Lance, President Carter and others, and they said you are absolutely right.

I wrote the same letter, and I got the same answer back, identical. You hold it up to the light, the same, word for word. I think what President Reagan recognizes is that we have got to deal with bureaucracies as institutional factors.

It is not this administration. I would even propose to give this administration a window through which they can do whatever regulatory changes they want to do through the end of this Congress, and put it in place for the future.

I am not trying to thwart this administration, what it wants to do, although it is interesting, some of my colleagues who opposed me on the Democratic side last time really wished they had had this in place when the new administration came in.

My interest is to put in place a mechanism which gives control to the Congress and in turn, therefore, to the public, the people, public participation if you will, through Congress in the regulatory process.

If we don't do that, we are headed for government by bureaucracy.

Mr. **Moakley**. Yours deals with any rule as opposed to H.R. 746, which just deals with major rules concerning, what is it, $100 million?

Would you stick with that, any rule or go to a major rule?

Mr. **Levitas**. I think we could deal with that problem. I think it is better to have any rule, because sometimes it is the rules which have less economic impact which can be the most troublesome and bothersome and create the problems.

I wouldn't want to put an arbitrary limit. That is one area of compromise. Another area I have thought about, there is no need to hold up all noncontroversial rules for the full 90-day period, and I would think that, if you consider this approach——

Mr. Moakley. Technical changes?

Mr. Levitas. Yes; get those out of the way and put a requirement if a resolution of disapproval is not introduced within 10 days, that it goes through, so that it is not every rule that actually comes before the scrutiny of the Congress.

Mr. Moakley. Do you think that there should be any difference in the way that executive and independent agencies are treated when it comes to legislative veto or some kind of regulatory reform?

Mr. Levitas. I think that both of them have to be subject to a legislative veto. I don't think you can say only independent agencies, because when you look at some of the executive branch agencies, they are the real troublesome ones.

They issue 75 percent of all the rules. Whether you thought EPA was issuing too many regulations, or whether you think today they are issuing lousy regulations, to leave EPA out of this thing is nonsense. It is just utter nonsense, or some of the other executive regulatory agencies.

I do think that you could devise a difference in procedure which would address the two in a different form. For example, I could conceive of using a concurrent resolution for executive branch agencies, and the 1½-House veto for independent agencies is a possibility, because I think you could argue that there ought to be a great obstacle in the path of a legislative veto on an executive branch agency, because the President has more control.

I would like to see the President have more control over his own agencies than he now has now. The administration is being sued now because in the last administration, the President tried to offer some comments to EPA and the Interior Department, his own agencies, and they said no, you don't have the right to do that.

I want the President to have more control over his own agencies, but you need a real legislative veto over both, and in the case of executive branch agencies, I would think a very fruitful area of compromise between the administration and the Congress could be, say, go to a concurrent resolution for executive branch agencies and a 1½-House veto for independent agencies.

That might be possible, but you cannot exclude the executive branch agencies, because if you do, you are letting the horse out of the barn.

Mr. Moakley. Congressman Taylor.

Mr. Taylor. Thank you, Mr. Chairman.

Elliott, Mr. Danielson, when he appeared earlier today indicated, of course, his opposition to the one- or 1½-House veto, and spoke for the bill he has introduced, it would require a certain amount of surveying and so forth, and that to me is good, but it seems somewhat vague.

He indicated that we could get at this problem by being more careful how we crafted legislation, and et cetera.

You would disagree that this is utterly impossible?

Mr. Levitas. Totally, utterly impossible.

That is like saying you can get better government by electing finer people to Congress or something like that. Sure, you can avoid the problem by drafting better legislation, by being specific on every point, but that is not going to happen, and I am not sure it ought to happen.

When we passed the gas deregulation bill and got to the question of gas prices, nobody had any idea what was going to happen a year in the future, so we put a legislative veto in, issued regulations, and put a veto in after we looked at the regulation.

The circumstances changed 1 year later, and there was obviously no need for those regulations, and even the administration which issued them understands the law asked in effect for us to veto them.

I have the greatest respect for George Danielson. I think he is an expert on regulatory reform, but I think he is absolutely dead wrong and living in a world of unreality if he thinks anything short of a legislative veto is a means of controlling the regulatory overkill.

Mr. TAYLOR. I agree with you. I think we all recognize the bureaucracy lives forever. Administrations and Congresses come and go. I once heard Mr. Bryce Harlow liken it to an elephant with a flea on it. He said you can change the fleas, but the elephant will go right along.

Looking at these regulations, we can't avoid the responsibilities we have. There are a lot of people being affected by them. We can't relegate this to the bureaucracy and say we passed a law and you promulgate the rules and regulations necessary to carry out the act and say we are done with it.

I just don't believe that strictly leaving these things to oversight as we now have oversight on our committees today is accomplishing that purpose. I guess we don't have time, but I don't think the oversight procedure that we are using today is accomplishing the mission.

Mr. LEVITAS. You are right on target. I mentioned to you we have been holding these hearings on the Federal highway aid, and we have already had 4 days of hearings on a proposed rule, a proposed rule being issued by the Federal Highway Administration, and when we get through with that process, we will have held 4 days of hearings on a rule being issued by the Federal Highway Administration, and my prediction is that we are going to come out with a bipartisan unanimous recommendation that what they are proposing is wrong.

It is costly. It is not the right way to go, and that rule is going to go forward. Oversight is important. We have made the record, made the case, brought the people in, but to spend 4 days, and I mean days, we didn't finish until 5 p.m., and the last time we were in until 4 p.m., and that was to deal with the rule at the end of the line, they will say that is pretty interesting.

It is not the way to go. There is a role for oversight. I am with the Government Operations Committee, and chairman of the Public Works Oversight Investigation Committee. I know oversight, and I think I do a pretty damned good job of oversight. We have done this oversight on the waste water treatment program and really made some improvements but oversight is not the way to get at the regulations.

You have got to have a sword to lump their heads off so they will listen to you. In 1975, I guess it was, Congress passed the Local Public Works Act. This was to help offset the ravages of recession and unemployment by creating public works programs which would employ people, so the Public Works Committee was saying, well, public works money should go into construction trades.

Therefore, in looking at the unemployment figures, the Secretary of Commerce had to take into account the level of unemployment in the construction industry. That is where the money was going to go, so it made no difference how many aerospace people were out of business.

They were not going to benefit from public works programs directly, so we said after having hearings, when you put that money out, you have got to take into account the construction industry unemployment.

The Secretary of Commerce came out with regulations, and they read as follows:

> For purposes of this act, the level of unemployment, the rate of unemployment in the construction trades is deemed to be the same as that general level of unemployment in the community.

So regardless of whether you had more construction people or fewer construction people employed, they reversed totally the specific intention.

We called the Assistant Secretary up, the guy who was responsible for it, and his deputy, fine people, and we questioned them. We questioned them for an hour, and they had all those reasons why they couldn't do it, and the bottom line was, and this is in the record, "Well, we just didn't think that was the way to go."

We didn't think that was the way to go. Who makes the laws, and they didn't change the regulation. That is why you have got to have legislative veto, because the record was clear. The Congress had already spoken and said construction will have unemployment.

Mr. MOAKLEY. We have heard the horror stories.

Mr LEVITAS. All I am saying is if there was an oversight, I rather suspect that at that time the chairman of the Oversight Committee was either Jim Wright or Bo Ginn, and it was a hell of an oversight. The record was clear, and the bottom line was they didn't agree with what Congress did, so they did it their way, and that is what happened.

Anyway, you understand.

Mr. MOAKLEY. Thank you very much.

As I say, of course, we expect that H.R. 746 will be coming up here with the Elliott Levitas bill appended to it.

Mr. TAYLOR. Did you pick that number, 1776?

Mr. LEVITAS. I did, after the first go-around when we tried to pass it, we got 265 votes when it had the number 12048, and that didn't mean anything, so I decided that since the next year was the year of the Declaration, I arranged for that number.

Mr. MOAKLEY. If I knew you were that number conscious, I would have given you the number my bill got.

Mr. LEVITAS. Thank you, we will substitute.

Mr. **Moakley**. Finally, we will hear testimony from Congressman Mickey Edwards. Mickey is a former member of both the Committee on Education and Labor and the Committee on Interior and Insular Affairs, and very well acquainted with the problems of agency rulemaking.

Congressman Edwards.

STATEMENT OF HON. MICKEY EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. **Edwards**. Thank you. Before I came here, I was a professor of law, and my natural tendency is to speak in 50-minute increments—but I promise not to do that.

I perfectly agree with what Elliott has said. I support his efforts to implement the legislative veto. He said it more articulately.

Mr. **Moakley**. Your bill is very similar to H.R. 1776?

Mr. **Edwards**. Let me skip very quickly over a few of the things that I try to address that I would like to bring to the committee's attention and which I think have been overlooked from time to time.

We have a tendency to talk about regulation in terms of how much it is costing people, or to relate horror stories, and I have been on oversight operations and seen the same things, but there are some aspects in the procedural areas of Federal regulation that bother me considerably and my bill deals with reform of the Federal Administative Procedures Act, not talking about how horrible the regulations are, or what they cost businessmen.

I would like to enter my entire statement for the record.

Mr. **Moakley**. Without objection, your entire statement will appear in the record.

Mr. **Edwards**. Forcing agencies to evaluate alternative methods of regulation, the legislative veto, effective outside review of an agency's analysis, prohibiting a court from deferring to the agency's wisdom in interpreting statutes, making it easier to challenge factual findings.

But let me go to the point of some of the rights that an individual has when that man or woman or business goes before a court, that they lose when they go before a Federal agency, and in fact are denied some of their basic constitutional guarantees.

Let me make these suggestions. I think the Congress ought to look at these in changing the basic thrust of the APA.

I think the agencies should be required to follow the doctrine of stare decisis. Many administrative agencies do not consider themselves bound by the rule of precedent, and the courts have been reluctant to impose even minimal standards of consistency upon the agencies.

As a result, decisions in adjudications are frequently inconsistent with one another or the agency does not put forward a coherent rationale for a line of decisions. Requiring agencies to follow the rule of precedent would force them to explicitly recognize changes in policy and to adequately distinguish one decision from another.

That gives somebody who is trying to follow the statutes, the regulation, the rules, some basis for operating so they are not in danger of constantly violating a regulation, because the agency has changed its mind.

There ought to be some precedent.

Under section 554 of the APA, the opportunity of interested parties to submit and to have considered facts, arguments, offers of settlement, or proposals of adjustment is granted only "when time, the nature of the proceeding, and the public interest permit."

This qualification is too broad and places the burden upon the wrong party. The agency ought to be able to make an exception, but it should have the burden of showing the need for an exception.

That is a very broad qualification and places the burden upon the wrong party, and it seems to me that while the agency ought to be able to make an exception and say, because there is an emergency situation, we don't have time to hear your argument, that ought to be a very rare case, and the burden ought to be placed on the agency of showing the need to impose that sort of a rule.

Third, it should not be so difficult for ordinary citizens to discover the real standards and policies of administrative agencies. I say ordinary citizens. As a law professor, I couldn't find out what they were, and it seems to me, agencies should be required to publish in readily accessible form detailed descriptions of the standards and principles governing their discretionary decisions. They should be required to publish all interpretive rules and statements of policy.

Fourth, the Administrative Procedures Act does not adequately protect the right of persons charged with violations of law or administrative rules or orders thereunder to be apprised of the theory of the case against them and the evidence which the agency may have considered in connection with the charge involved.

The individual must have the right to know the theory of the case against him; to examine all such evidence; and to confront, examine, and crossexamine any adverse witness. That is a basic constitutional right that you have when you go into a courtroom, and that you lose when you go before a Federal agency that can take away your license, fine you, impose all kinds of punishments on you, and you don't have the right to confront a witness and find out what is being said against you.

Fifth, each Federal agency establishes its own procedures for obtaining evidence and these vary greatly, forcing citizens to shop for expensive and highly specialized attorneys familiar with the unique proceedings of a single agency. There should be more uniformity here.

You have to find a lawyer, somebody that knows how to go before the FTC or whatever it is.

It would be possible to require Federal agencies to use either the Federal Rules of Evidence or some other standardized rules of evidence, so a person has a chance in going before one of these agencies to make a case without shopping around for these expensive attorneys.

Six, and I have two more. The doctrine of exhaustion of administrative remedies causes a great deal of frustration to individuals and small businessmen who simply throw in the towel, because they cannot afford to pursue an appeal through all levels of the bureaucracy from the local office in Oklahoma City down to Dallas to Washington, and up through the levels in Washington.

It is cheaper to throw in the towel and pay the fine or revise whatever you are doing than it is to try to get justice.

Seven, the fourth amendment guarantees no American should be subject to unreasonable searches and seizures, and "no warrant shall issue," but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

In *Marshall* v. *Barlow's,* there was a two-pronged standard. One is, the Court held OSHA at times conducted unconstitutional searches and seizures, and they said in the test under Barlow, OSHA can obtain a warrant when they prove that a specific business has been chosen for a search on the basis of a general administrative plan for enforcement.

Even the British troops who ransacked American warehouses could have gotten a search warrant. The whole system of administrative inspections would work better if agencies were forced to have some specific evidence or reason to believe there was a violation before they could obtain a search warrant to go into a business.

I will conclude with that. I think that, as you look at the problem of Federal regulation, it would be good to haul out the Federal Administrative Procedures Act, as I did when I was teaching the course, and every time I went through it, I got more and more appalled by the way in which agencies can set aside basic constitutional guarantees that every business ought to have a right to expect.

Mr. MOAKLEY. Aren't most rules made by the informal rulemaking process?

Mr. EDWARDS. Most of them are, but there are a great many made under a formal proceeding; but if you look at the act, you can also reach the informal procedures, and what I am talking about is something that would cut across both formal and informal, and at least preserve a semblance of basic guarantees.

For example, I am not a pilot, but a pilot, a private pilot, can easily have his license to fly taken away from him, which he may use in his business or whatever else totally informally without any right to be heard, without any right to present evidence, and they make a finding, they strip you of your license.

Mr. MOAKLEY. You probably know that it appears that the one bill that has some chance of coming out of committee and coming before the Rules Committee is H.R. 746.

I was wondering if you would probably want some amendments dealing with the Administrative Procedures Act to present on the floor of the House to H.R. 746 that may cure some of the things that you talk about in H.R. 2299?

Mr. EDWARDS. I would be glad to pursue it that way or to present specific amendments from this bill to the committee that might possibly be included in the bill as it comes out of committee.

I don't have a proprietary interest in H.R. 2299. I would like to see some of these things incorporated into the law.

Mr. MOAKLEY. If anything has a chance of going through the legislative process, it is H.R. 746.

Some of the things probably would be better in amendment form to H.R. 746.

Gene?

Mr. **Taylor**. Will the Judiciary Committee make the changes you think are necessary in the Administrative Procedures Act?

Mr. **Edwards**. I hope they will. I have tried to get them to bring some of these in.

There is some support for some of the provisions in H.R. 2299. I am also working through that.

Mr. **Moakley**. I thank you.

Mr. **Taylor**. You made some very good points.

Mr. **Moakley**. You are the first one that talked about the weaknesses in the Administrative Procedures Act.

Thank you very much for your presentation.

Mr. **Edwards**. Thank you.

[Mr. Edward's prepared statement follows:]

PREPARED STATEMENT OF HON. MICKEY EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. Chairman, the growth of Federal regulation has posed one of the greatest threats to our free enterprise system.

Every businessman finds himself subject to a radically increased number of federal regulations governing virtually every aspect of his enterprise. The Business Roundtable, for example, found that in 1977 forty-eight companies spent 15 percent of their net income after taxes to comply with the regulations of just six Federal agencies and programs.

Reform of Federal regulation has been a major priority of mine since I entered Congress in 1977. The time is right for the enactment of a general reform bill. The various proposals have been well studied and debated. The new administration is committed to genuine reform. And the American people are demanding that we get the Federal bureaucracy off their backs.

Here's what I think are the elements of a good bill:

First, agencies must be forced to evaluate, on a non-mathematical basis, proposed regulatory alternatives and to choose the least costly way to achieve the regulatory goal or to explain the reason why the more costly alternative was chosen.

Second, there must be an effective outside review of the agency's regulatory analysis.

Third, there should be a legislative veto of proposed rules and regulations. In his opinion in *FTS* v. *Ruberoid* 343 U.S. 470 (1952), Justice Jackson characterized the powers that Congress has delegated to administrative agencies in the twentieth century as "unfinished law which the administrative body must complete before it is ready for application." To uphold the basic principle that law is made by elected Representatives rather than unelected administrators, the Congress must supervise the agency's completion of this "unfinished law."

How else "is the line between delegation and abdication to be maintained?", to use the words of constitutional scholar Edward S. Corwin.

Fourth, courts must be prohibited from deferring to "agency wisdom" in interpreting statutes. It is the duty of the judge, not administrators, to interpret the law.

Fifth, agency factual findings must be made easier to challenge. In rule makings, an opportunity should be provided for oral presentations. This should include cross-examination where needed to resolve factual issues. And courts should be required to set aside factual determinations that do not have substantial support on the record. In major adjudicatory cases, courts should be required to set aside agency findings not supported by a preponderance of evidence in the record taken as a whole.

Sixth, agencies should be required to periodically review their major regulations to see whether they should be withdrawn or modified.

Last, but most important, I would urge the subcommittee to address the issue of individual rights before administrative agencies. This problem is better recognized outside of Washington, D.C., than here. In a recent Washington Post series what most outraged the citizens of Appleton, Wisconsin about Federal regulators is that the regulators did not trust the people. "You're guilty until you're proven innocent," one man said. In my opinion, better protection against bureaucratic arrogance can only come by affording greater procedural protection to the individual who has to confront the Federal bureaucracy.

When I taught administrative law at Oklahoma City University, I became disturbingly aware that the Federal Administrative Procedures Act is greatly lacking in procedures and safeguards to protect individual rights. I would urge the subcommittee to consider the following amendments to the APA, which are embodied in H.R. 2299, my Administrative Procedures Reform Act of 1981:

1. Agencies should be required to follow the doctrine of *stare decisis*. Many administrative agencies do not consider themselves bound by the rule of precedent, and the courts have been reluctant to impose even minimal standards of consistency upon the agencies. As a result, decisions in adjudications are frequently inconsistent with one another or the agency does not put forward a coherent rationale for a line of decisions. Requiring agencies to follow the rule of precedent would force them to explicitly recognize changes in policy and to adequately distinguish one decision from another.

2. Under section 554 of the APA, the opportunity of interested parties to submit and to have considered, facts, arguments, offers of settlement, or proposals of adjustment is granted only "when time, the nature of the proceeding, and the public interest permit." This qualification is too broad and places the burden upon the wrong party. The agency ought to be able to make an exception, but it should have the burden of showing the need for one.

3. It should not be so difficult for ordinary citizens to discover the real standards and policies of administrative agencies. Agencies should be required to publish in readily accessible form detailed descriptions of the standards and principles governing their discretionary decisions. They should be required to publish all interpretive rules and statements of policy.

4. The Administrative Procedures Act does not adequately protect the right of persons charged with violations of law or administrative rules or orders thereunder to be apprised of the theory of the case against them and the evidence which the agency may have considered in connection with the charge involved. The individual must have the right to know the theory of the case against him; to examine all such evidence; and to confront, examine and cross-examine any adverse witness. In any administrative proceeding in which a sanction might be imposed, the rights of the individual should be the same as they would be in a judicial proceeding.

5. Each Federal agency establishes its own procedures for obtaining evidence and these vary greatly, forcing citizens to shop for expensive and highly specialized attorneys familiar with the unique proceedings of a single agency. There should be more uniformity here. I suggest that we require all Federal agencies to adopt the Federal Rules of Evidence.

6. The doctrine of exhaustion of administrative remedies causes great frustration to many individuals and small businessmen who simply cannot afford to appeal a decision through several levels of administrative review. It should be possible to appeal a decision through several levels of administrative review. It should be possible to appeal a decision to a court without exhausting all of one's administrative remedies.

7. The Fourth Amendment guarantees that no American shall be subject to "unreasonable searches and seizures" and that "no warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized." In *Marshall* v. *Barlow's*, 436 U.S. 307, the Supreme Court held that many warrantless administrative inspections are unconstitutional, but it also held that all OSHA needs to show to get a warrant is "that a specific business has been chosen for an OSHA search on the basis of a general administrative plan" for enforcement. Under the two-pronged Barlow's test OSHA can obtain a warrant on the basis of updated statistics that there is a safety problem in a particular industry and that the particular establishment is likely to have this problem as well. Even the British troops who ransacked American warehouses for contraband goods could have received a search warrant under this loose standard. The whole system of administrative inspections would work better if agencies were forced to have some specific evidence of an existing violation before they could get a warrant.

Mr. Chairman, for too many years the American businessman has been at the mercy of the Federal bureaucracy. The result has been increased costs, reduced productivity, inflation, unemployment—all of which can be laid, at least partially, at the feet of the federal regulators. And there has also been a serious loss of the individual freedoms on which our system rest. It's time we, as the people's representative, began to correct this major national problem.

Mr. **Moakley**. Statements have been submitted by Representatives Ken Kramer and Don Fuqua. Without objection, these statements will be made a part of the record, as though read, of today's record.

STATEMENT OF HON. KEN KRAMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. **Kramer**. Mr. Chairman and members of the committee: I was very pleased to learn of the hearings which this subcommittee is conducting on the issue of the legislative veto, because I have become increasingly convinced, the more I have seen the Government at work, that the taxpayers of this country deserve a much better accounting of the rules and regulations which impact on their lives than they have been getting. And, I am convinced that it is the Congress—which enacts the laws which form the basis for the multitude of rules and regulations issued by the Government, and which is ultimately accountable to the electorate as regulators are not—it is the Congress which should be held accountable for the rules and regulations of the Government.

For the past several years, we have heard an increasing chorus of complaints from people all across the Nation about excessive regulations, unrealistic regulations, duplicative or contradictory regulations, and regulations which go beyond the intent of the law. For too long, the response from the Congress was to pass more laws of broad scope, leaving the fine print to the unelected, unaccountable regulators. It is time to alter the pattern, and we can do that by being somewhat more precise in the laws which we pass—without becoming, as Senator Baker has cautioned, "elected bureaucrats"—and by becoming involved in the regulatory process to the end of assuring that regulations promulgated do in fact reflect congressional intent.

Because I believe this congressional responsibility to make Government regulators and regulations more accountable to the public is so important, I have taken both legal and legislative steps to further establish the congressional role in the regulatory process.

Last December, I filed suit against the Secretary of Education, Shirley Hufstedler, to stop implementation of a regulation which had been disapproved by the Congress in accordance with the procedures set out in the General Education Provisions Act. Joining me as coplaintiffs were 21 other Members of the House and Senate. The regulation at issue in the suit would have established the Education Appeal Board, and it was disapproved by passage of House Congressional Resolution 318 in May 1980. The main reason the regulation was disapproved was because it exceeded the statutory authority, which provided for a 30-day filing period for appeals, while the regulation allowed the Board to extend this filing period at the discretion of the Chairman of the Board. The fact that there was no statutory authority for such an extension was pointed out to the Department by the chairman of the Education and Labor Committee during the draft phase of the regulation process. Nevertheless, the extensions was included in the final regulation. When this regulation was disapproved by the Congress, the Department announced its intention to implement the regulation as written, irrespective of congressional disapproval.

In my view, this confrontation represented a subversion of the fundamental balance of powers between the coequal branches of Government. If allowed to stand, the position of the executive branch, in ignoring congressional will, would allow the executive branch to assume legislative powers through an unfettered rulemaking process, denying the Congress its traditional power to limit the delegation of authority which it grants to executive agencies to execute the law. The executive's failure to implement the law would further jeopardize the future of the legislative process by putting in question the execution of laws duly passed by the Congress. The Constitution requires the President to faithfully execute the laws of the land—this does not give him the power to pick and choose among the laws he will execute. The Supreme Court held in a case decided in 1838,

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely impermissible.

It was my hope that the suit would proceed to judicial resolution because I believe that it represented an excellent test case of the legislative veto authority. Unfortunately, the administration has apparently decided not to let this particular issue become the test case, and the Secretary of Education has notified the chairman of the House Education and Labor Committee of his intention to withdraw the regulation.

Thus, the issue of the constitutionality of the legislative veto authority remains unresolved, making it, I believe, all the more important for the Congress to reassert its legislative authority by passage of a comprehensive regulatory review bill. Over the past several years, the Congress has tried to assume a greater measure of control over Government regulations through numerous legislative review and approval mechanisms on individual bills, or portions of bills. However, as the number of laws and agencies has expanded over the years, the regulatory volume has grown geometrically, and the efforts at congressional control have been haphazard at best. In the absence of congressional control, too often the unelected bureaucrats have assumed responsibilities beyond mere implementation and have effectively used the regulations writing process to become legislators or policymakers—as was clearly exemplified in the Education Appeal Board regulations. It is clearly time for the Congress to establish a comprehensive legislative review and approval mechanism for regulations issued by all the Government agencies, and I urge the members of this committee, and my colleagues in the Congress, to make this a legislative priority in the 97th Congress.

I have been an enthusiastic supporter and cosponsor of H.R. 1776, a comprehensive regulatory reform bill introduced by Representative Levitas. However, I believe that just as the end result of congressional disapproval mechanism is important, so is the process by which that disapproval mechanism can be effectively employed. And I do not believe that that process has received adequate attention. Therefore, I have introduced a bill, H.R. 1330, which incorporates the basic format for congressional disapproval and reconsideration of agency regulations as contained in H.R. 1776, but goes a step further by setting out a uniform procedure for the Congress to follow in reviewing agency regulations and in considering disapproval or reconsideration resolutions.

Specifically, my bill would require each standing committee to designate one subcommittee as having responsibility for reviewing all agency regulations which come within the legislative and oversight jurisdiction of that committee. New regulations would be transmitted to the responsible committee, and then referred to the designated subcommittee, and would not become effective if both Houses pass a resolution of disapproval within 90 days, or if either House passes a resolution within 60 days which is not disapproved by the other body within the next 30 days.

Resolutions of disapproval and resolutions for reconsideration would also be referred to the designated subcommittee, and the bill provides a timetable for congressional action on such resolutions once reported by the subcommittee. If the full committee does not disapprove the subcommittee's report, or fails to act within the allotted period of time, the committee is automatically discharged from further consideration of the resolution, and the resolution is then placed on a special calendar for floor consideration. A resolution on regulations calendar is established to assure prompt consideration of resolutions of disapproval and resolutions for reconsideration without unnecessarily disrupting the regular legislative schedule. A separate calendar for regulations would highlight the importance of this critical congressional oversight function and would guard against such resolutions being buried in committee or lost in the floor shuffle.

While not always glamorous or newsworthy, the oversight responsibility of Government regulations rests with the Congress, and it is extremely important that the Congress reassert its legislative prerogatives which have been increasingly assumed by the executive and regulatory agencies. The legislative veto authority is a necessary and proper means to assure the proper implementation of laws which the Congress enacts. The bill I have introduced sets out a systematic process to assure the effective and thorough exercise of that authority.

I sincerely hope that this committee will report a comprehensive regulatory review and legislative approval bill, and I hope that you will seriously consider the process by which that review and approval authority would be exercised, such as I have proposed in the bill I have introduced.

Thank you very much for the opportunity to present my thoughts and perspectives on this very important subject.

STATEMENT OF HON. DON FUQUA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Fuqua. Mr. Chairman, I appreciate this opportunity to testify before your subcommittee in behalf of my bill, H.R. 243, and similar proposals to provide for a legislative veto of agency proposed rules and regulations. I have long supported this type of legislation and commend you for convening these hearings.

We all know of cases where we, as individual Members of Congress, were distressed by some agency rule that we and our constituents found objectionable. It ranges from the Bureau of Alcohol, Tobacco and Firearms to the Environmental Protection Agency to the Federal Trade Commission. The list seems endless.

We have often had to resort to riders attached to appropriations bills to force an agency to cease its proposed rules. Although I have voted for these riders in certain instances, I do not favor that particular approach. I would much prefer for Congress to have an opportunity to vote up or down on the proposed rules.

Efforts have proven successful in including legislative veto provisions in individual authorization bills. This case-by-case method is cumbersome and I believe very strongly that we need a Government-wide approach to the problem of agencies going beyond their authorized powers.

The 30-day time period for congressional action is very significant. Thirty days gives both proponents and opponents of a proposed rule enough time to marshal their forces and let Members of Congress know how they feel. At the same time, I cannot think of too may things an agency could want to do that could not wait 30 days. Agency claims that this would delay important regulations are nonsense.

I can envision some problems at first. However, it would not be long before committee staffs could be trained to handle the proposed regulations in an expeditious manner. Speaking as chairman of the Committee on Science and Technology, I am confident that my staff will be able to streamline the review process to insure that there are no unusual delays.

The one-House veto aspect of the legislation is, in my opinion, very crucial. Opponents to a regulation would have a doubly difficult time trying to persuade both Houses of Congress in a 30-day period. I believe that if a majority of either House strongly objects to a proposed regulation, it simply should not be permitted to go into effect. The fact that either the House of Representatives or the Senate disagrees with an agency should be sufficient to terminate the agency's proposed action.

Mr. Chairman, we have been working on the legislation for a long time. We have faced opposition from Presidents of both parties. The current President has indicated agreement with the principle of the legislative veto and we should take him at his word that he would not oppose this legislation. It is needed if we are to get a handle on a bureaucracy which, more and more, is running our lives. I am a strong believer in the legislative veto concept and I urge your subcommittee to approve H.R. 243 or similar legislation.

Once again, thank you for the opportunity to testify on this important matter.

Mr. MOAKLEY. The subcommittee will stand adjourned.

[Whereupon, at 12:35 p.m., the subcommittee was adjourned.]

CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

THURSDAY, NOVEMBER 19, 1981

House of Representatives,
Subcommittee on Rules of the House,
Committee on Rules,
Washington, D.C.

The subcommittee met, pursuant to call, at 2 p.m., in room H-313, the Capitol, Hon. John Joseph Moakley (chairman of the subcommittee) presiding.

Present: Representatives Moakley, Beilenson, Frost, and Lott.

Mr. Moakley. The subcommittee will now come to order.

Today, the Subcommittee on Rules continues its hearings on the legislative veto and other proposals for congressional review of agency rulemaking.

The legislative veto is only one aspect of the overall regulatory reform effort presently before the Congress. Any discussion of the legislative veto should, therefore, be viewed within the context of other congressional efforts to improve the administrative rulemaking of our Federal agencies. It would be shortsighted of any congressional committee to examine matters within its jurisdiction without recognizing their impact on related legislative proposals.

To date, the subcommittee has heard testimony from Members of Congress, the American Bar Association, and Congress Watch. In addition, the administration has also had an opportunity to present its views through a representative from the Justice Department. The administration has expressed various objections to the traditional 1½- and 2-House veto on both constitutional and policy grounds.

Today, several additional Members of Congress will appear. We are delighted to have the Honorable Trent Lott, who is a member of this subcommittee, ranking minority member of the Subcommittee on the Legislative Process, and minority whip. He will discuss his bill H.R. 4838. Trent has sought to forge an interesting compromise in an effort to reconcile those who have opposed some aspects of the traditional legislative veto. We look forward to his testimony.

The Honorable George Hansen, sponsor of H.R. 314, is scheduled to appear. Congressman Hansen will, I am sure, draw from his own experience with agency rulemaking gained as a member of both the Committee on Agriculture and the Committee on Banking, Finance and Urban Affairs.

We will then hear from two public witnesses—the National Association of Manufacturers and the National Federation of Independent Business. Both of these organizations have been actively involved in the debate over regulatory reform, particularly the issue of the legislative veto. Their testimony will add a valuable perspective to our deliberations. Hopefully, they will share their views on the effect of Government regulation and Federal rulemaking activities on the business community.

Mr. MOAKLEY. Now, the committee is very privileged and happy to hear from Congressman Trent Lott.

STATEMENT OF HON. TRENT LOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. LOTT. Thank you very much, Mr. Chairman. It is a privilege for me to appear before this distinguished committee, which I am honored to be a part of. I want to apologize for one previous instance in which I was scheduled to testify here and was not able to make it.

Mr. MOAKLEY. The committee took into consideration your other side duties.

Mr. LOTT. Absolutely peripheral as compared to what we are talking about here.

I ask that my statement be included in the record.

Mr. MOAKLEY. Without objection, Congressman Lott's statement will appear in the record.

Mr. LOTT. I ask that we also include in the record two CRS studies that I will refer to.

Mr. MOAKLEY. Without objection, the CRS studies will also appear in the record.

Mr. LOTT. I have an abbreviated statement, some of which I will read, but most of which I will skip around and make major points.

I think it is important that we take a look at the various pieces of legislation that have been introduced in this area, and I hope the subcommittee will take a look at the bill I introduced, which I refer to as the Regulatory Control Act of 1981. I introduced it first as H.R. 3740, and reintroduced a revised version this week as H.R. 4838, trying to find some mechanism acceptable as a compromise that we could go forward with.

You know that we have about four or five different angles or serious considerations in this effort. We do have to take into consideration what the Senate is doing or may do. We do have the Judiciary Committee bill, which the gentleman from California, Mr. Danielson, has been working on now. I understand it has been reported to the full Committee on the Judiciary. You have the Levitas bill, sponsored by a large number of Members of the House, both Democrats and Republicans.

I am committed to regulatory control and to oversight and to some form of legislative veto. I am not wedded to this, my proposal, solely. I think there are some problems with the Levitas approach, which I voted for a number of times in various forms. I think that is one of the problems, we have got so many forms that have developed now we have a hodgepodge mess on our hands, with 350 varieties of legislation.

Mr. **Moakley**. Over 200, anyway.

Mr. **Lott**. We need to set basic ground rules. I would like to be able to come up with something that we can get the administration to accept. Otherwise we are going to wind up with a confrontation. I have passed that along to the administration. I believe for the first time we may be getting input into that area.

The bill I have is a good faith effort to find some common ground between the Levitas H.R. 1776, of which I am a cosponsor, and the administration position that such legislation is unconstitutional. The administration has stated in writing, in effect, a similar position as the previous administration, but I think they are going to have to face this issue.

The Levitas bill provides a so-called one-and-a-half House veto for all proposed regulations and those existing regulations which either House forces an agency to reconsider or repromulgate. My bill would require both Houses to disapprove independent agency regulations and those executive agency regulations which a committee determines are contrary to law or congressional intent, which is a little different angle. Other proposed executive regulations would be subject to a joint resolution of disapproval as would any existing regulation promulgated pursuant to the adoption by either House of a resolution for reconsideration.

My bill would permit an executive agency to appeal to the courts a disapproval action taken by concurrent resolution, and would permit the court to put the regulation into effect on a finding that the regulation is consistent with the statute, and the agency had no alternative means of implementing or enforcing the law. The ability to appeal to the court is the approach I have tried to use to satisfy the administration so that if we went too far in executive regulations, they have some recourse in the courts. I think there is some attractiveness in that to Members on both sides of the aisle in the House, and some people in the administration, although I must confess that some of the lawyers on the Judiciary Committee have raised reservations about that, and I am sure we will argue that point later. It seems to me a normal progression. You do that in other instances when the Congress has a law that goes too far or is unconstitutional.

Mr. **Moakley**. Many Members are trying to get the courts out of the legislative business. This is another way of insulating them.

Mr. **Lott**. I know that, but was that not the way the system was set up? We pass the laws, and the courts are there to interpret and enforce them.

Mr. **Moakley**. If there is any problem that cannot be solved by anybody else, it ends up in the courts. These men of wisdom end up running school programs, prisons, everything. I think there must be other people of intelligence to do the same thing.

Mr. **Lott**. I think we have switched roles. That is my argument that I use in most instances.

Mr. **Moakley**. I thought you would recognize it.

Mr. **Lott**. It is a valid one to be considered, but it is an option that I would like us to weigh as we continue to probe around and try to find a way to deal with this area. I am convinced that a strong legislative veto device must be a part of overall regulatory reform. We are going to have to deal with this in one way or another. We have the Levitas version, which with all its cosponsors we assume it might pass and wind up being vetoed I think in that form.

We need to look around for some changes. I have been talking regularly to the gentleman from Georgia, Mr. Levitas, trying to see if we could make changes, and he has been cooperative, and we are still working in that effort between ourselves and the administration.

In addition to providing different forms of disapproval for different types of regulations than does the Levitas bill, my bill as revised also has some, I think, important procedural differences. The main one I would like to highlight is what is called a front-end discharge mechanism. The Levitas bill provides that a discharge motion would be in order on the floor if a committee does not report a disapproval resolution within so many days after it is introduced, whereas my bill provides that if one-fifth of the Members of the first House to act sponsor or cosponsor a disapproval resolution, a committee would be required to undertake a review of the regulation and report a disapproval resolution with its recommendation that it be adopted or rejected. If the committee has not reported as required after 45 days from the day the rule is submitted, the first such disapproval resolution would be automatically discharged for floor consideration. However, this special discharge procedure would not apply to concurrent resolutions of disapproval for executive agency regulations, since such resolutions must be accompanied by a committee finding that the regulation is contrary to law or congressional intent.

In the second House to act, discharge would be automatic if a committee has not reported within 15 days after the resolution is referred to it from the first House. The original bill that is introduced only provided a special discharge in the second House to act, but the revised version includes this front-end discharge mechanism because there is legitimate concern that committees sympathetic to agencies might bottle up regulations over which there is a great deal of controversy and substantial objection. The committees would know in advance about such controversy and objection, and would then have time to review it and recommend on such regulations without being blind-sided, in effect. Committees could also initiate reviews of regulations themselves, but if they so announced formally to the Speaker and in the Congressional Record, they would be forced to report a resolution or it would be discharged if they did not. This would prevent a committee from failing to report to get around doing anything.

I do not want to deal at length in this summary on the constitutional objections raised by the administration both to the Levitas bill and the one I proposed. This subcommittee has already done a good job on that in its report last year. I think that you addressed those questions and rebutted them quite effectively. The only conceivable constitutional objection which might be valid is if Congress blocked an agency from implementing a law through regulations. For that reason, I permit executive agencies to appeal such actions in the courts, this appeal court action or appeal to the courts action.

The practical objections to the legislative veto just do not hold water in light of experience. It is argued that this will cause a system overload. We do have cracks in our institutional procedures around here, and it could be overloaded, but we already have nearly 300 veto provisions in the law, 47 veto provisions in the law which now apply to regulations, and these have been exercised only 14 times in the last 9 years.

The point is I do not think it would be used. I do not think it would overload the system. I think it is there as an avenue we can use when an agency or a department does get out of hand. I think the threat of that veto would have a positive impact on agencies and departments, and I think we ought to write this out. We are not going to allow the system to be abused by inflicting a legislative veto on everything that comes along, but it gives us an avenue.

It would be easy for me as the Republican whip of the administration, to be against it now because the administration does not want it. I realize it could be abused both ways. If the Congress went too far one way or the other we could abuse it, but regardless of philosophy or party, I think agencies and departments with regulations have gotten out of hand and gone too far and misconstrued what the law intended, and felt they could ignore it and write the law the way they want it. We need an opportunity in some way to get a handle on it some time.

All of this raises another objection. It is argued that if the vetos now in law are rarely used, they really are not necessary. I do not put any stock in that at all. Just the fact that they can be helpful, that they are a threat, makes them necessary. You have the example of the Department of Education last year which submitted four sets of their regulations. We disapproved them, and then the Secretary of Education went back and dealt with those problems and then they in effect front-end loaded. Instead of waiting until we got into trouble and then having the veto possibility, they consulted more closely with the Congress before they drafted the regulations.

Mr. MOAKLEY. I agree. If that happened, there would be no need for this subcommittee at all.

Mr. LOTT. To me that is a big argument for the necessity to have it, even though it may not be used that much. I reject the notion that a generic legislative veto device will somehow strengthen the so-called iron triangle between subcommittees, agencies, and interest groups. In the first place, I disagree that there is something inherently bad in close cooperation and consultation between branches of Government and citizens affected by their policies, so long as this is not just used to circumvent the law. Our system of Government depends on such access and cooperation for its success. Instead of strengthening the iron triangle, I think the legislative veto would have an effect of maybe controlling it a little bit. Maybe I could be wrong, but I think it could have a positive effect on getting that under control.

In conclusion, I think a legislative veto for regulations will help serve our institutional need for better oversight and our constitutional imperative to retain control over all the lawmaking done by this Government.

Thank you, Mr. Chairman. I would be glad to answer questions.

[Mr. Lott's prepared statement and attachments follow:]

Prepared Statement of Hon. Trent Lott, a Representative in Congress From the State of Mississippi

Mr. Chairman and members of the subcommittee: I am grateful for this opportunity to testify on my "Regulatory Control Act of 1981" which I first introduced as H.R. 3740 on June 1 of this year. On Monday of this week I introduced a revised form of this bill as H.R. 4838 which retains the basic disapproval provisions of my original bill for Federal regulations but makes some procedural changes which I shall discuss in detail later.

Mr. Chairman, as you may know, I am one of the 231 House cosponsors of the popular Levitas legislative veto bill, H.R. 1776, as I have been in past Congresses. And I want to give all due credit to the gentleman from Georgia for his pioneering and persistent efforts in this area. However, as you know, this administration, like its predecessors dating back to F. D. R., has objected to such legislation on constitutional grounds. While the administration has gone further than its predecessors in its own regulatory reform efforts and in expressing a willingness to accept some form of congressional disapproval authority for selected independent regulatory agencies, without Presidential involvement in the process, it was my feeling that this would still not be acceptable to a House majority. I therefore decided I would make a good faith effort at forging a compromise betweeen the Levitas and administration positions on this controversial issue. Moreover, I thought there was room to remedy some of the institutional and procedural objections which have been raised against the Levitas bill. My "Regulatory Control Act of 1981" is the product of those efforts. Unfortunately, but perhaps predictably, the administration has raised most of the same constitutional objections to my bill as it has to the Levitas bill. However, I can't help but think that my legislative veto bill would be less likely to provoke a Presidential veto than the Levitas approach if it reached the White House as part of a comprehensive regulatory reform bill.

And it is my hope that a strong legislative veto provision for Federal regulations will be a part of an overall regulatory reform bill that will be enacted by this Congress. I certainly don't consider the legislative veto as a panacea for our regulatory problems. Rather, it can and should be one important and effective weapon in the congressional oversight arsenal. As you know, the House Judiciary Subcommittee on Administrative Law has reported Chairman Danielson's regulatory reform bill, H.R. 746, to the full committee. That bill includes a provision for congressional disapproval of major regulations by joint resolution, subject to the President's approval or veto. But I seriously doubt that this will be acceptable to the super majority of House Members who have cosponsored the Levitas bill. It is therefore my hope that this committee will, at the appropriate time, make other legislative veto alternatives in order as amendments to H.R. 746 when it comes before this committee for a rule.

As you know, the Levitas bill would permit one or both Houses to disapprove both proposed regulations and those existing regulations which either House forces an agency to reconsider and repromulgate. It would also permit a discharge motion to be offered on the floor for those disapproval and reconsideration resolutions not reported by a committee within a specified period after their introduction. My Regulatory Control bill, on the other hand, would require that both Houses adopt a concurrent resolution of disapproval for proposed independent regulatory agency regulations, and those proposed executive agency regulations which a committee determines to be contrary to law or congressional intent. Proposed Executive agency regulations which are objectionable on other grounds would be subject to a joint resolution of disapproval, as would be any existing regulation which Congress forces an agency to reconsider and repromulgate. My bill would also permit executive agencies to appeal in the courts any disapproval action taken by concurrent resolution, and the courts could order the rule to take effect anyway on a finding that the rule is consistent with the statute under which it was promulgated, and that the agency had no alternative means of implementing or enforcing the statute.

The revised bill which I have introduced this week makes several important procedural changes in H.R. 3740. First, I have eliminated section 2 of H.R. 3740 which would have made certain changes in section 553 of the Administrative Procedure Act relating to rulemaking proceedings. Second, I have extended the coverage of the legislative veto provisions to nearly all regulations of general applicability, as opposed to just "major" and "significant" regulations as defined in H.R. 3740. Third, I have extended the initial congressional review period for regulations from 30 days to 60 days. If either House adopts a disapproval resolution within that initial review period, the period would be extended to 90 days from the date of submission of the regulation. A rule could take effect sooner if either House rejects a resolution of disapproval or if a committee fails to announce its intention to undertake a review of a rule within 30 days after its submission.

Fourth, and perhaps most important, I have added what I call a "front-end discharge mechanism" for disapproval resolutions in the first House to act. Under my original bill, no special discharge procedure was provided if a committee did not report a disapproval resolution within a specified period—as the Levitas bill would provide. However, my original bill would have permitted a discharge motion to be considered, if supported by one-fifth of the Members of the House involved, if a committee in the second House to act had not reported the disapproval resolution within 15 days after its referral from the first House.

Under my new discharge proposal, if one-fifth of the Members of the House involved sponsor or cosponsor an appropriate disapproval resolution within 25 days after the submission of the regulation, a committee would be required to announce and undertake a review of the rule, and report a disapproval resolution with its recommendations not later than 45 days after submission of the rule. If it does not report within 45 days, the committee would automatically be discharged from consideration of the first such resolution referred to it. This special discharge procedure, however, would not apply to concurrent resolutions for executive agency regulations since such resolutions must be accompanied by a finding that the rule is contrary to law or congressional intent. In the second House to act, discharge would be automatic after 15 days of the resolution's referral if a committee has not reported.

It seems to me that this discharge mechanism is best designed to permit a committee time to review and report on a regulation about which there is substantial interest, while at the same time insuring that a disapproval resolution cannot be bottled-up in a committee when there is substantial objection to it. But, the important thing, it seems to me, is that the House involved should have the benefit of a committee report on any regulation proposed to be disapproved so that we can act in an intelligent and informed manner on it. Under the Levitas bill we would not necessarily have that opportunity since a committee could be blind-sided by a last minute surge of interest after its own review period had expired.

Under my bill a committee could also obviously undertake a review of a regulation on its own initiative, but, if it formally announces such an intention to review a rule to the Speaker and in the pages of the Record within 28 days of submission of the rule, it would again be required to report a resolution of disapproval, even if it should ultimately recommend its rejection; and it would be automatically discharged of the resolution if it did not so report within 45 days after submission of the rule. This has been done to prevent a committee from discouraging cosponsors by first announcing its intention to review a rule, then failing to report the disapproval resolution.

Finally, my revised bill would decouple reconsideration of existing rules which Congress forces an agency to repromulgate, and those which an agency determines to reconsider on its own initiative. Under my original bill, both situations would be subject to disapproval by joint resolution. Under my revised bill, only rules repromulgated pursuant to the adoption of a resolution for reconsideration would be subject to disapproval by joint resolution. Those regulations which an agency decides on its own to either modify or repeal would be considered as new rules subject to the same disapproval procedures as any other new rule. This change recognizes the difference between rules which Congress forces an agency to repromulgate and those an agency changes on its own initiative because, in the former instance, it can be argued that Congress is changing a rule which has the force and effect of law and is therefore amending the law. As such, the action should involve the President.

Mr. Chairman, the whole purpose behind such a generic legislative veto law for regulations is to bring uniform and comprehensive coverage to proposed and existing regulations and to permit the Congress to review those regulations, and, for good cause, to disapprove them. At the end of the last Congress the CRS estimated that there are currently some 190 laws containing more than 270 separate congressional veto provisions of some type. According to a further CRS study which I requested, these include 29 statutes containing some 47 legislative veto provisions applicable to rules and regulations. To quote from one CRS issue brief:

"Uniformity or standardization of procedure has not been a leading characteristic of congressional veto devices. To the contrary, as many as 20 separate types can be distinguished, each of which differs with respect to whether advance approval is required or prior disapproval is permitted by either or both Houses of Congress, or committees thereof, and whether action shall be by passing a simple, concurrent or joint resolution, or some combination thereof."

The statistics I have alluded to are only current through the 96th Congress. According to a CRS study dated August 21, 1981, the reconciliation bill enacted this year includes some nine additional veto provisions, including four which would apply to regulations. So I think it should be apparent to this committee where we are heading if we don't adopt a generic legislative veto bill that would bring some uniformity and predictability to this whole process: these will simply continue to proliferate piecemeal in all manner of forms that will only compound the confusion and chaos these have injected into the legislative process. My bill on the other hand, like the Levitas bill, would provide that this legislative veto procedure for regulations would supersede all existing veto procedures for regulations. My bill would take effect at the beginning of the next Congress and would sunset at the end of the 100th Congress so that we would have an opportunity to review its workability and effectiveness before we renew it. If the provisions of my bill should expire, my bill provides that those veto provisions in existing law which have been superseded by this bill shall resume their effectiveness.

Mr. Chairman, the justification for such congressional involvement is soundly grounded in the fact that the rulemaking authority granted to agencies is a delegation of legislative powers. Yet, too often, the rulemakers have strayed from the intent of Congress or exceeded the scope of the law the regulations are designed to implement.

But, even when the regulation drafters remain technically within the scope of the law, their labors effectively further amend the law and have the force and effect of law. Since both political and technical considerations often make it impossible for the Congress to write more detailed legislation in order to avoid making such broad grants of rulemaking authority, we are left with the alternative of either totally abdicating this important legislative power to the Executive or seeking to retain some control over it.

And it just seems to me that if we still take seriously Article I, section 1 of the Constitution which says that "All legislative powers herein granted shall be vested in a Congress of the United States," then we really have no alternative but to retain control over this delegation of our legislative powers. And the only way we can effectively do this, so far as I know, is through some kind of legislative veto device.

This brings me to the main objection raised by this and previous administrations to such legislative veto bills—that they are unconstitutional. The argument is made that they violate the so-called presentment clause of the Constitution, Article I, section 7, clauses 2 and 3, which requires that all bills, resolutions, votes and orders of the Congress, having legislative effect, must not only receive the concurrence of both Houses, but must be presented to the President for his approval or veto.

I think the best response to this constitutional argument was made by this subcommittee in its report of last year, and by the Court of Claims in the *Atkins* case, to wit, that congressional disapproval of a proposed action does not have the legislative effect of changing existing law or making new law: it simply preserve the status quo. The Justice Department witness who testified before you recently completely ignored the distinction between proposed regulations and those already in effect which do have the force and effect of law. Moreover, he ignored the fact that such a legislative veto device would be established by law, either signed by the President or enacted over his veto.

Instead, he seemed to imply that the congressional disapproval action is the unilateral withdrawal of a power delegated to the Executive by law, and therefore, in effect, an amendment of the law. But this argument ignores the fact that legislative veto bills like mine and the Levitas bill make clear that agencies are not relieved of their responsibility under law to issue regulations, nor are they prevented from doing so by other means.

The only conceivable situation in which a congressional disapproval action might interfere with the President's constitutional obligation to "take care that the laws be faithfully executed" is if the Congress blocked all possible regulations to carry out the laws. For that reason I have included my court appeal mechanism which would permit an executive agency to reverse a disapproval action if it could show the regulation was consistent with the law and the agency had no alternative means of implementing or enforcing it. It seems to me this meets the only possible constitutional objection the President might validly raise.

The administration has also objected to that provision of my bill which would permit a committee to find that a regulation is contrary to law or congressional intent, saying that in so doing the Congress is assuming a judicial function. But no one is arguing that the Congress would be the final arbiter in this matter. My court appeal mechanism makes that clear. The committee finding is simply an internal mechanism for the Congress to determine what form of disapproval procedure is should use. I might point out that this determination is already in effect with respect to regulations issued by the Department of Education. Just as the Executive must make a quasi-judicial determination as to whether a proposed rule is consistent with the law, so too must the Congress in reviewing that rule and determining whether it should be disapproved, and, if so, by what method. And just as the Congress must daily make a quasi-judicial determination as to whether a particular bill will pass constitutional muster, so too must the President in determining whether to sign or veto that bill. No one would argue, for instance, that the President should not veto a bill he considers unconstitutional since only the courts can make such a determination. By the same token, no one can argue with any persuasiveness that neither the Executive nor the Congress can make independent determinations that a particular regulation is contrary to law, because this is assuming a judicial function. We must all make daily decisions as to the legality or constitutionality of our decisions. We can't simply ignore these legal considerations on the grounds that it's a matter for the courts to decide.

Mr. Chairman, let me turn now to some of the practical objections which have been raised to the legislative veto device. First, it is charged that the institution of this procedure would cause legislative chaos and anarchy. I think my bill goes a long way toward avoiding such a situation by placing more emphasis on the need and possibility for committee consideration and action on regulations before the matters reach the floor. My front-end discharge mechanism allows ample opportunity for committees to consider rules about which there is controversy. I have eliminated any discharge mechanism for resolutions for reconsideration. No special discharge mechanism would be provided for concurrent resolutions disapproving executive agency rules.

Another argument heard is that this would force committees to consider thousands of regulations each year, requiring additional staff and committee time. I think this is a far-fetched, worst-case scenario. The fact is, very few regulations would ever require formal committee consideration. As one committee chairman once said, any committee worth its salt already has staffers responsible for reviewing regulations on a daily basis. This would not change. The best gauge of how this might affect our process is to look at the nearly 300 veto provisions already in law. According to the CRS, only 85 disapproval resolutions were passed in the last nine years, most of which were budget deferrals. Only 14 disapproval resolutions were passed in that same period respecting the 47 veto provisions which now apply to regulations.

The conclusion one can draw from this is that while a large number and variety of veto provisions are already available by statute, very rarely are they actually exercised. Nor have they proven to be an excessive burden on committees.

However, it's interesting to note that the same critics who charge this will lead to an overload on the system will turn around and seize on these statistics of rare and selective exercise of the veto to argue that, if they are not being used, they are not necessary. It seems to me this argument misses the whole point of adopting such devices in the first place. And the whole purpose of the legislative veto, as I see it, is not in its ultimate exercise—in pushing confrontation with the executive branch to its outer limits—but in avoiding such confrontation in the first place by promoting more consultation and negotiation between the two branches before a proposal takes effect. In short, the main advantage of the legislative veto is that it serves as a *deterrent* to arbitrary or capricious action by the Executive through the retention by Congress of ultimate control over such actions.

Obviously, if the bureaucrats are aware that the Congress is constantly looking over their shoulders, as well it should be in its oversight capacity, and that the Congress can reverse and action which does not meet with its approval, those bureaucrats are going to be much more sensitive and responsive to the Congress and the laws it has passed. In short, the veto device holds the rulemakers accountable to the elected lawmakers, as well they should be.

This is not just wishful theory; it is borne out in a number of case studies of the legislative veto, some of which were commissioned by this very subcommittee. In the last Congress you published a report entitled "Studies on the Legislative Veto," prepared by the Congressional Research Service. Included in this report were chapters on Federal Election Commission regulations, GSA regulations on the Nixon tapes, and HUD regulations. Without going into detail on each of these chapters, the main thing which comes through in all these case studies is the manner in which agencies subject to the veto threat are more inclined to work with the committees of Congress in resolving potential problems before they issue their final regulations. In those instances where they did not, such as in some of the initial FEC and GSA regulations, Congress was not reluctant to come down hard on regulations which it considered to exceed congressional intent or the scope of the law.

I would also call your attention to a hearing published by a House Education Subcommittee in September of last year entitled "Oversight Hearing on Congressional Disapproval of Education Regulations." You may recall that in the last Congress we disapproved four sets of education regulations on grounds they were contrary to law or congressional intent. The Department of Justice urged the Department of Education to put the regulations into effect anyway. And while the Secretary of Education did so, she also began an immediate review of all four sets of regulations and subsequently submitted three amendments to the regulations which addressed the concerns raised by Congress in its disapproval actions.

Furthermore, the Secretary issued a memo to all departmental personnel on September 4, 1980, outlining a new policy on issuing regulations. And, the first priority concern in designing this new policy reads as follows:

"First, our regulations must reflect congressional intent regarding the law being implemented. We must formalize a process which insures that this condition is met. The Office of Legislation will play a major role in guaranteeing the congressional concerns are considered during this regulation drafting process."

As Secretary Hufstedler explained during her testimony, "I believe it would be profitable to increase the dialogue between the regulation drafters and the Congress." It was also clear from her testimony that she did not seek any future confrontations with the Congress. The legislative veto device had served its most useful purpose in forcing the bureaucrats to pay more heed to Congress and the law in drafting future regulations.

The final argument raised against the legislative veto is that it will only serve to strengthen the iron triangle which exists between the subcommittees, agencies and interest groups by making cooperation a practicable necessity and thereby insuring the status quo. I don't accept the notion that such triangles are inherently evil or bad so long as the status quo being maintained is a respect for and compliance with the laws which Congress has enacted. Our system of government depends for its success on maximizing participation and cooperation in the decisionmaking process, both between the branches, and between the Government and the governed. But, in rare instances where congressional intent is being ignored due to cozy relationships in such subsystems, the existence of a veto device and the special discharge potential can be used by Members as an additional pressure point on committees to act where they now might be reluctant to act.

In conclusion, Mr. Chairman, I think a legislative veto for regulations will help serve our institutional need for better oversight and our constitutional need to retain control over all the lawmaking done by this government.

[Attachments to Mr. Lott's statement follow:]

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House of Representatives

THE REGULATORY CONTROL ACT

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Mississippi (Mr. LOTT) is recognized for 15 minutes.

● Mr. LOTT. Mr. Speaker, today I am introducing a revised version of the Regulatory Control Act of 1981 which I first introduced as H.R. 3740 on June 1, 1981. This legislation was offered then, and is reoffered now, as a good faith effort to find some middle ground between the popular Levitas legislative veto bill for Federal regulations and the administration's opposition to such legislation on constitutional grounds.

As my colleagues are aware, the Levitas bill, H.R. 1776, would permit one or both Houses to disapprove proposed or existing Federal regulations. The administration has testified that it would accept nothing less than a joint resolution of disapproval, requiring Presidential signature, for executive agency regulations, but could accept a concurrent resolution of disapproval for regulations of selected independent regulatory agencies. The House Judiciary subcommittee, on the other hand, has reported a regulatory reform bill which includes a provision for disapproval of all major regulations by joint resolution only.

Mr. Speaker, H.R. 3740 as originally introduced, provides for disapproval of independent agency regulations by concurrent resolution, and the same disapproval approach would apply to those executive agency regulations which a committee finds to be contrary to law or congressional intent. Executive agency regulations which a committee finds objectionable for other reasons would be subject to enactment of a joint resolution of disapproval, as would any existing regulation which either House forces an agency to reconsider and repromulgate.

H.R. 3740 would also permit executive agencies to appeal a disapproval action taken by concurrent resolution to the courts, and permit the court to allow the rule to take effect anyway on a finding that it is consistent with the statute, and that the agency has no alternative means of implementing or enforcing the statute.

These central features of H.R. 3740 are retained in the revised bill which I am introducing today. However, I have made several procedural changes in the original bill. First, I have eliminated section 2 of H.R. 3740 which would have made certain changes in section 553 of the Administrative Procedure Act. Second, I have extended coverage of the legislative veto provisions to nearly all regulations of general applicability, as opposed to just "major" and "significant" regulations as defined in H.R. 3740. Third, I have extended the initial congressional review period for regulations from 30 days to 60 days. If either House adopts a disapproval resolution within that period, the review period would be extended to 90 days from the date of submission of the regulation. A rule could take effect sooner if either House rejects a resolution of disapproval or if a committee fails to undertake a review of a rule within 30 days after its submission.

Fourth, and perhaps most important, I have added what I call a front-end discharge procedure for disapproval resolutions in the first House to act. Under my original bill, no special discharge procedure was provided if a committee did not report a disapproval resolution within a specified period, as the Levitas bill would provide. However, a discharge motion would be in order in the second House to act, if a committee has not reported the resolution within 15 days after its referral from the first House, and if that motion is supported by one-fifth of the membership of the House involved.

Under my new discharge proposal, if one-fifth of the Members of the House involved sponsor or cosponsor an appropriate disapproval resolution within 25 days after submission of the regulation, a committee would be required to announce and undertake a review of the rule, and report a disapproval resolution with its recomendations not later than 45 days after submission of the rule. If it does not report within 45 days, the committee would automatically be discharged of the first such resolution referred to it. This special discharge procedure, however, would not apply to concurrent resolutions for exceutive agency regulations, since such resolutions must be accompanied by a committee finding that the rule is contrary to law or congressional intent. In the second House to act, discharge would be automatic 15 days after referral of the resolution if a committee has not reported.

It seems to me this discharge mechanism is best designed to both permit a committee time to review and report on a regulation about which there is substantial interst, while at the same time insuring that a disapproval resolution cannot be bottled up in a committee when there is substantial objection to it. But the important thing, it seems to me, is that the House involved have the benefit of a committee report on any regulation proposed to be disapproved so that we can act in an informed manner.

A committee could also obviously undertake a review of a rule on its own initiative, but, if it formally announces such a review to the Speaker and in the CONGRESSIONAL RECORD within 28 days after submission of the rule, it would again be required to report a resolution of disapproval, and it would be automatically discharged of such a resolution if it did not report within 45 days after submission of the rule.

Finally, I have eliminated the provision of H.R. 3740 which would have tied agency review of major existing rules every 10 years with the ability of either House to adopt a resolution for reconsideration of any other existing rule—both of which would have forced an agency to repromulgate the existing rule and thus subject it to possible disapproval by joint resolution. Under my revised bill, the joint resolution disapproval mechanism would only apply to those existing rules which Congress forces an agency to repromulgate. Any existing rule which an agency decides to modify or repeal on its own initiative would be treated as a new rule under the disapproval mechanisms which apply to new rules.

Mr. Speaker, I think this revised bill does meet the administration halfway while doing the same with respect to the Levitas bill. I expect this issue will come to the House in the form of an amendment to whatever regulatory reform bill is finally reported from the House Judiciary Committee. It is important that this be viewed as one component in an overall regulatory reform strategy, and not as a panacea for our regulatory problems. But I do think it is important that Congress reclaim its prerogatives over the legislative powers we have delegated to agencies through the rulemaking process. As elected representatives of the people, we should be held ultimately accountable for the laws we pass, including the regulations issued to carry them out.

At this point in the RECORD, Mr. Speaker, I include a brief summary of my revised Regulatory Control Act.

H.R. 4838—BRIEF SUMMARY OF REVISED REGULATORY CONTROL ACT BY HON. TRENT LOTT

(1) *Coverage.*—The congressional review procedures would apply to all proposed and existing rules of general applicability (with exceptions specified);

(2) *Submission and referral.*—Proposed final rules would be submitted to Congress on the same say as publication in the Federal Register, and would be referred to one committee in each House having jurisdiction over the statute or agency under which the rule in promulgated.

(3) *Time limits.*—No rule could become effective for 60-days of continuous session of Congress after submitted, and the review period would be extended to 90-days if either House adopts an appropriate resolution of disapproval within the 60-days period. A rule could become effective sooner if no committee announces its intention to review the rule within 30-days after its submission, or if either House rejects an appropriate resolution of disapproval.

(4) *Forms of disapproval.*—An appropriate resolution of disapproval would be: (a) a concurrent resolution for any proposed Executive agency rule which a committee determines is contrary to law or congressional intent; (b) a joint resolution for any Executive agency rule which a committee determines should be disapproved for any other reason; (c) a concurrent resolution for any proposed independent regulatory agency rule which a committee determines should be disapproved; and (d) a joint resolution for any existing rule which is repromulgated pursuant to the adoption by either House of a resolution for reconsideration. A rule could not become effective if an appropriate resolution is adopted by both Houses, or enacted, as the case may be, within the specified time period.

(5) *Special discharge procedures.*—If one-fifth of the membership of the House involved sponsors or cosponsors an appropriate resolution with respect to a proposed rule within 25-days after its submission, a committee would be required to review the rule and report the resolution within 45-days after the rule's submission (except this special discharge procedure would not apply to concurrent resolutions disapproving Executive agency rules). Discharge would be automatic if a committee has not reported after 45-days. In the second House to act, discharge would be automatic if a committee has not reported the resolution adopted by the first House within 15-days after its referral.

If a committee determines to review a rule on its own initiative, and so announces to the Speaker and in the Congressional Record within 28-days after submission of the rule, it would be required to report an appropriate resolution within 45-days after the rule's submission, and would be discharged if it does not.

(6) *Floor consideration.*—Once an appropriate resolution is reported or discharged, it would be highly privileged, subject to two-hours of debate divided between proponents and opponents, and not subject to amendment or a motion to recommit.

(7) *Reconsideration of existing rules.*—Either House may adopt a simple resolution for reconsideration of any existing rule in effect for at least two years if such resolution is properly reported from committee. With respect to any rule for which a resolution for reconsideration has been adopted, and agency would be required to review the rule and either renew, modify or repeal it. Any such action would be subject to the congressional review process of the Act and possible disapproval by enactment of a joint resolution.

(8) *Court appeal.*—All proposed Executive (as opposed to independent) agency rules which are disapproved by adoption of a concurrent resolution can be put into effect if an agency appeals the action in the Federal District Court for the District of Columbia and the court finds the rule is consistent with the statute and the agency has no alternative means of implementing or enforcing the statute.

(9) *Miscellaneous.*—

An agency may not promulgate a new rule substantially the same as a rule which has been disapproved, but may incorporate the relevant portions of the rulemaking record for the disapproved rule into that for the new rule;

Disapproval of a rule shall not relieve agencies from responsibility to adopt a rule, but time limits would begin again from date of disapproval;

Congressional inaction or rejection of a disapproval resolution shall not be deemed approval for judicial review purposes;

Invalidation of any portion of the Act shall not invalidate the remainder of the Act;

The new rulemaking review procedures shall supersede existing ones;

The Act shall take effect at the beginning of the 98th Congress and expire at the end of the 100th Congress;

Any rulemaking review procedures shall resume their effectiveness if the provisions of this Act cease to be effective.●

BRIEF SUMMARY OF REVISED REGULATORY CONTROL ACT - HON. TRENT LOTT

(H.R. 4838)

(1) Coverage -- The congressional review procedures would apply to all proposed and existing rules of general applicability (with exceptions specified);

(2) Submission and Referral -- Proposed final rules would be submitted to Congress on the same day as publication in the Federal Register, and would be referred to one committee in each House having jurisdiction over the statute or agency under which the rule is promulgated.

(3) Time Limits -- No rule could become effective for 60-days of continuous session of Congress after submitted, and the review period would be extended to 90-days if either House adopts an appropriate resolution of disapproval within the 60-days period. A rule could become effective sooner if no committee announces its intention to review the rule within 30-days after its submission, or if either House rejects an appropriate resolution of disapproval.

(4) Forms of Disapproval -- An appropriate resolution of disapproval would be: (a) a concurrent resolution for any proposed Executive agency rule which a committee determines is contrary to law or congressional intent; (b) a joint resolution for any Executive agency rule which a committee determines should be disapproved for any other reason; (c) a concurrent resolution for any proposed independent regulatory agency rule which a committee determines should be disapproved; and (d) a joint resolution for any existing rule which is repromulgated pursuant to the adoption by either House of a resolution for reconsideration. A rule could not become effective if an appropriate resolution is adopted by both Houses, or enacted, as the case may be, within the specified time period.

(5) Special Discharge Procedures -- If one-fifth of the membership of the House involved sponsors or cosponsors an appropriate resolution with respect to a proposed rule within 25-days after its submission, a committee would be required to review the rule and report the resolution within 45-days after the rule's submission (except this special discharge procedure would not apply to concurrent resolutions disapproving Executive agency rules). Discharge would be automatic if a committee has not reported after 45-days. In the second House to act, discharge would be automatic if a committee has not reported the resolution adopted by the first House within 15-days after its referral.

If a committee determines to review a rule on its own initiative, and so announces to the Speaker and in the Congressional Record within 28-days after submission of the rule, it would be required to report an appropriate resolution within 45-days after the rule's submission, and would be discharged if it does not.

(6) Floor Consideration -- Once an appropriate resolution is reported or discharged, it would be highly privileged, subject to two-hours of debate divided between proponents and opponents, and not subject to amendment or a motion to recommit.

(7) Reconsideration of Existing Rules -- Either House may adopt a simple resolution for reconsideration of any existing rule in effect for at least two years if such resolution is properly reported from committee. With respect to any rule for which a resolution for reconsideration has been adopted, and agency would be required to review the rule and either renew, modify or repeal it. Any such action would be subject to the congressional review process of the Act and possible disapproval by enactment of a joint resolution.

(8) Court Appeal -- All proposed Executive (as opposed to independent) agency rules which are disapproved by adoption of a concurrent resolution can be put into effect if an agency appeals the action in the Federal District Court for the District of Columbia and the court finds the rule is consistent with the statute and the agency has no alternative means of implementing or enforcing the statute.

(9) Miscellaneous --

- an agency may not promulgate a new rule substantially the same as a rule which has been disapproved, but may incorporate the relevant portions of the rulemaking record for the disapproved rule into that for the new rule;
- disapproval of a rule shall not relieve agencies from responsibility to adopt a rule, but time limits would begin again from date of disapproval;
- congressional inaction or rejection of a disapproval resolution shall not be deemed approval for judicial review purposes;
- invalidation of any portion of the Act shall not invalidate the remainder of the Act;
- the new rulemaking review procedures shall supersede existing ones;
- the Act shall take effect at the beginning of the 98th Congress and expire at the end of the 100th Congress;
- any rulemaking review procedures shall resume their effectiveness if the provisions of this Act cease to be effective.

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Washington D.C. 20540

June 19, 1981

TO : The Honorable Trent Lott
Attention: Don Wolfensberger

FROM : Clark F. Norton
Specialist in American National Government
Government Division

SUBJECT : Congressional Veto of Executive Rules, Regulations and Orders: Statutory Authority and Expedited Procedures

The enclosed report has been prepared in response to your request for a brief analysis of statutory provisions authorizing congressional veto of executive rules, regulations and orders. You also asked for information about expedited procedure rules and congressional action on approval and disapproval resolutions in connection with those provisions. One of the problems involved in compiling such data is to determine which specific executive branch proposals and actions should be included within the scope of those terms. In the absence of a precise, universal definition for a rule or a regulation, the inclusion or exclusion of provisions from such a list will depend upon which criteria are applied in the selection process.

Accordingly, this report has been separated into two parts. The first (Part A) comprises only those executive proposals subject to legislative approval or disapproval procedures which are generally classified without question as being executive rules, regulations or orders. Most authorities undoubtedly would consider the actions listed therein to be within those categories. The second (Part B) includes executive proposals which, although under certain criteria might be classified as rules, regulations or orders, might not be so considered under a narrow definition. For example, among this group are such matters as Presidential findings, recommendations and determinations on tariffs, import relief and export controls, allocations and prices of fuels, pay adjustments, production from the petroleum reserve, and military actions, plus agency determinations on such policy issues as rail passenger routes, export or storage of nuclear fuels, withdrawals from public lands, and interest rate differentials.

Twenty-nine separate statutes requiring congressional approval or authorizing congressional disapproval of executive branch proposals have been identified in Part A which, under a strict definition, without question would seem to constitute rules, regulations or orders. On the other hand in Part B an additional 32 congressional veto laws have been located that pertain to executive proposals which, while generally not classified as such, might be considered to be rules, regulations or orders if viewed from a broader, less restrictive interpretation. For analysis purposes, you may wish to accept or reject some or all of the items listed in Part B according to your own standards and criteria.

In those cases where the statute provides special procedural rules to expedite consideration of approval or disapproval that fact is indicated at the end of each item in both Parts A and B. Data on the number of resolutions, if any, that have been introduced and acted upon under these various acts will be sent to you separately as soon as it can be compiled.

Please let me know if we can provide additional help in this or other matters.

CFN/mhb

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CONGRESSIONAL VETO OF EXECUTIVE RULES, REGULATIONS AND ORDERS: STATUTORY AUTHORITY AND EXPEDITED PROCEDURES

Clark F. Norton
Specialist in American National Government
Government Division
June 19, 1981

CONGRESSIONAL VETO OF EXECUTIVE RULES, REGULATIONS AND ORDERS: STATUTORY AUTHORITY AND EXPEDITED PROCEDURES

A. PROPOSALS SUBECT TO LEGISLATIVE VETO WHICH ARE GENERALLY CLASSIFIED AS EXECUTIVE RULES, REGULATIONS OR ORDERS

1. Public Health Cigarette Smoking Act of 1970 (P.L. 91-222; approved April 1, 1970).

Sec. 7. If the Federal Trade Commission determined on or after July 1, 1971, that action should be taken on its pending trade regulation rule related to cigarette advertising, the act required that such a determination, plus the text of any proposed regulation and a full statement about its basis, should be transmitted to both Houses of Congress and would not become effective for six months in order that "Congress may act if it so desires." (This did not authorize a specific legislative veto as such)

2. Defense Production Act of 1950 Amendment of 1970 (P.L. 91-379; approved August 15, 1970).

Sec. 103. Standards which a newly created Cost Accounting Standards Board was authorized to promulgate had to be submitted to Congress and would not become effective if both the Senate and the House of Representatives passed a concurrent resolution of disapproval within 60 days, excluding those on which either House was not in session because of an adjournment for more than 3 days to a date certain.

3. Education Amendment of 1974 (P.L. 93-380; approved August 21, 1974)

Sec. 509. Any standard, rule, regulation or general requirement proposed by the Commissioner of Education would not become effective if Congress adopted a concurrent resolution of disapproval within 45 days.

Sec. 842. Guidelines which the Commissioner of Education was directed to prepare and publish for States to use in developing a plan for a program of financial assistance to local educational agencies for equal educational opportunity were to be submitted to Congress no later than April 1, 1975, and could be disapproved by either the Senate or the House by adopting a resolution of disapproval before December 1, 1975. Thereafter, new guidelines to be issued by the Commission could be disapproved within 30 days by adoption of a concurrent resolution of disapproval by both Houses.

4. Employee Retirement Income Security Act of 1974 (P.L. 93-406; approved September 2, 1974).

Sec. 3032. Regulations which the Secretary of Labor was directed to submit to Congress, no later than three years after passage of this act to protect the pension and retirement rights and benefits of certain personnel employed under contracts or grants, would not become effective if either House within 120 days adopted a resolution of disapproval.

5. Federal Election Campaign Act Amendments of 1974 (P.L. 93-443; approved October 15, 1974).

Sec. 209. Rules and regulations on the filing of campaign financial reports and statements, which were to be submitted to Congress by the Federal Election Commission, could be disapproved within 30 days by either House adopting a resolution of disapproval. Although the provision of this act authorizing appointment by Congress of four members of the Commission was held to be unconstitutional by the United States Supreme Court on January 30, 1976, the law was amended (see P.L. 94-283 below) to rectify this invalidity and the authorization for Congressional veto of rules and regulations was retained.

6. Motor Vehicle and Bus Safety Amendments of 1974 (P.L. 93-492; approved October 27, 1974).

Sec. 109. Motor vehicle safety standards to be promulgated by the Secretary of Transportation are to become effective in 60 days after their transmittal to Congress unless both Houses adopt a concurrent resolution of disapproval during that period.

7. Presidential Recordings and Materials Preservation Act of 1974 (P.L. 93-526; approved December 19, 1974).

Sec. 104. Regulations to be proposed by the Administrator of the General Services Administration governing public access to Presidential tape recordings and other materials can be disapproved by the adoption of a disapproval resolution by either the Senate or the House of Representatives within a period of 90 "legislative" days after their submission to Congress.

8. Federal Nonnuclear Research and Development Act of 1974 (P.L. 93-577; approved December 31, 1974).

Sec. 12. Rules or orders promulgated by the President requiring the allocation or performance of contracts related to the acquisition of scarce, critical and essential materials and equipment could not become effective if either House of Congress adopted a resolution of disapproval within thirty days after they are submitted to it.

9. Amendment to Social Security Act Child Support Provisions (P.L. 94-88; approved August 9, 1975).

Sec. 208. Standards proposed by the Secretary of Health, Education and Welfare to protect the best interests of children affected by certain child support provisions of the Social Security Act will not become effective if either House of congress adopts a resolution of disapproval within 60 days.

10. Energy Policy and Conservation Act (P.L. 94-163; approved Dec. 22, 1975).

Sec. 551. Fourteen different types of energy actions proposed by the President under this act can be disapproved by the adoption within 15 days (period extended later to 60 days by P.L. 95-52) of a resolution of disapproval by either House of Congress.

Secs. 201 and 552 any energy conservation plan, or any amendment thereto, can not become effective unless both Houses of Congress adopt an affirmative resolution of approval within 60 days.

Secs. 551 and 552 provide special rules to expedite consideration for action on resolutions of approval and disapproval.

11. Federal Election Campaign Act Amendments of 1976 (P.L. 94-283; approved May 11, 1976).

Sec. 101. Any rules or regulations which the Federal Elections Commission proposed before the date of passage of this act must be submitted to Congress and may be rejected by either House adopting a resolution of disapproval within 30 days.

12. Energy Conservation and Production Act (P.L. 94-385; approved August 14, 1976).

Sec. 305. Final energy conservation performance standards regulating new building construction, which the President was directed to submit to Congress, could not be enforced until both Houses had adopted a resolution of approval within 90 days after their submission.

13. Petroleum Marketing Practices Act (P.L. 95-297; approved June 19, 1978)

Sec. 301. Interim rules for the subsidization of motor fuel marketing, to be prescribed by the President before January 1, 1980, must be approved by the adoption by both Houses of Congress of an affirmative resolution within 90 calendar days of continuous session.

14. Airline Deregulation Act of 1978 (P.L. 95-504; approved October 24, 1978).

Sec. 43. Rules promulgated by the Secretary of Labor for monthly assistance payments to certain eligible employees can be disapproved by the adoption of a resolution of disapproval by either House of Congress within 60 days.

15. Housing and Community Development Amendments of 1978 (P.L. 95-557; approved October 31, 1978).

Sec. 324. Any proposed rule or regulation of the Department of Housing and Urban Development, which either the Senate Committee on Banking, Housing and Urban Affairs or the House Committee on Banking, Finance and Urban Affairs has notified the Secretary it intends to review from a previously submitted agenda, must be transmitted to the Committee at least 15 calendar days before its publication in the Federal Register. If either the Senate or House Committee reports out or is discharged from a joint resolution disapproving the rule or regulation, it will not become effective for 90 days unless either House rejects the resolution of disapproval before then.

16. Education Amendments of 1978 (P.L. 95-561; approved November 1, 1978)

Secs. 1138 and 1212. Regulations respecting various Indian education matters, permitting educational agencies and institutions to submit required Federal educational information to a single Federal or State educational agency, or establishing a formula for determining the minimum allotment of funds necessary for operating each school in the Defense dependents education system, can be disapproved by the adoption of concurrent resolutions by both Houses of Congress within 45 (or 60) days.

17. Natural Gas Policy Act of 1978. (P.L. 95-621; approved November 9, 1978).

(a) Sec. 202 (c)(1). An amendment prescribed within 18 months by the Federal Energy Regulatory Commission, to the rule providing for the passthrough of certain natural gas costs, can be disapproved within a period of 30 days of continuous session of Congress by the adoption of a resolution of disapproval by either the Senate or the House of Representatives.

(b) Sec. 206(d)(2). A rule or order by the Federal Energy Regulatory Commission exempting, in whole or in part, any other incrementally priced industrial facilty from the rule providing for the passthrough of certain natural gas costs, can be disapproved within a period of 30 calendar days of continuous session of Congress by the adoption of a resolution of disapproval by either the Senate or the House of Representatives.

Sec. 507 provides for special rules to expedite procedure in consideration of resolutions of disapproval.

18. Health Planning and Resources Development Amendments of 1979 (P.L. 96-79; approved October 4, 1979)

Sec. 126(a)(2). Before promulgating regulations defining health care facilities for purposes of sec. 1531(5) of the Public Health Service Act as amended, the Secretary was directed to "consult with" the Committee on Labor and Human Resources of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives. [Note. Although not specifically conferring power to approve or disapprove proposed regulations, this language apparently provides more legislative control than do provisions requiring only advance notification of proposed executive actions. The fact that the Secretary must consult in advance with committees before issuing regulations might result in modification of their content or even in their withdrawal if the committees so insisted. This type of legislative control is somewhat similar to at least four earlier laws which had provided that certain Department heads must "come into agreement" with committees before following certain courses of action (see 58 Stat. Ch. 165, p. 189-90, 1944; 63 Stat. Ch. 98, p. 66, 1949; 65 Stat. Ch. 434, p. 336-66, 1951; and 66 Stat. Ch. 726, p. 625, 1952). The Armed Forces Code, approved August 10, 1956, similarly directed that the Armed Services Committee must be consulted by the Secretary of the Navy before taking certain actions (see 70A Stat. Ch. 641, secs. 7426 and 7431).

19. Department of Education Organization Act. (P.L. 96-88; approved October 17, 1979)

Sec. 414. Rules and regulations to be promulgated by the Secretary of Education with respect to programs transferred to the new department under sections 301-306 of this act, as well as rules and regulations to the extent they were applicable immediately prior to the effective date of this act, are made subject by this section to the congressional veto procedure provided by section 431 of the General Education Provisions Act. In effect, this means that any such rule or regulation will not become effective if Congress, within 45 days after its submission, adopts a concurrent resolution of disapproval.

20. Federal Election Campaign Act Amendments of 1979 (P.L. 96-187; approved January 8, 1980)

Sec. 109. The Federal Election Commission is directed to transmit to Congress any rule, regulation or form proposed under this act. Within 30 legislative days (i.e., calendar days in session) either House is authorized to disapprove by resolution any such proposed rule or regulation, and within 10 legislative days either House may disapprove any proposed form.

Sec. 109 also provides special rules for discharge of a committee and motions to proceed on disapproval resolutions but does not limit the time for consideration of or debate on such resolutions.

21. Civil Rights of Institutionalized Persons (P.L. 96-247; approved May 23, 1980)

Sec. 5. Minimum standards promulgated by the Attorney General for the development and implementation of an effective system to resolve grievances of persons confined in any jail, prison, or other correctional or pretrial detention facility, will not become effective if either House of Congress adopts, within 30 legislative days after their publication, a resolution of disapproval.

No provision for expedited consideration of a resolution of disapproval.

22. Federal Trade Commission Improvements Act of 1979 (P.L. 96-252; approved May 28, 1980)

Sec. 21. A proposed final FTC regulation may be rejected by the adoption of a concurrent resolution of disapproval by both Houses within 90 days of continuous session after its subcommission.

To assure timely action on such a resolution of disapproval, rules were modified in Sec. 21 to provide for such expedited procedures as referring a resolution immediately to appropriate committees, filing a privileged motion to discharge a resolution unless it is reported by a committee after 75 days, and limiting debate to one hour on a discharge motion and to ten hours on a resolution of disapproval. The Comptroller General is directed to monitor the operation of the congressional review of FTC regulations; he is instructed to prepare and submit a report to Congress before the end of the fiscal year 1982 listing all rules submitted to Congress by the FTC, all rules disapproved by Congress, and final rules promulgated after others have been disapproved. He is also to analyze any impact which disapproval resolutions may have had on the decisionmaking and rulemaking process of the FTC.

Finally, the act also provides for expedited consideration by the Supreme Court of the constitutionality of its congressional veto procedure.

When he signed the bill on May 28, President Carter described the two-house congressional veto procedure as "both unwise and unconstitutional" and said that he looked forward to a challenge in court of its validity.

23. Energy Security Act (P.L. 96-294; approved June 30, 1980)

Sec. 104 (e) (new sec. 307). Directs the President to transmit any proposed synthetic fuel action to both Houses of Congress for review. Such an action will become effective after 30 calendar days of continuous session unless either House within that time passes a resolution of disapproval. However, if each House passes a resolution indicating that it has no objection to the proposal, the action may become effective prior to the end of the 30-day period.

To help expedite congressional consideration of a resolution for the approval or disapproval of a proposed synthetic fuel action, special rules are provided. Among other procedures these rules make a motion to discharge a committee from such a resolution to be in order after 20 days, limit debate to one hour on a motion to discharge and to five hours on a resolution, prohibit an amendment to or a motion to recommit a resolution, and place an amendment in the nature of a substitute under the 5-minute rule in the House of Representatives.

Sec. 128 (c). Similar to synthetic fuel actions submitted by the President under sec. 104 above, any synthetic fuel action proposed by the Synthetic Fuels Corporation must also be submitted to Congress and will not take effect if either House within 30 calendar days passes a resolution of disapproval. Likewise, this section provides rules to expedite congressional consideration of such a disapproval resolution that are basically identical with those set forth in sec. 104 (e) (new sec. 307) noted above.

Sec. 129. This section sets forth the procedures to be followed in considering a concurrent resolution of approval for proposals to amend the comprehensive production strategy submitted by the Board of Directors of the Synthetic Fuels Corporation under sec. 126 (d). Such a resolution is to be introduced in each House on the first day both Houses are in session after it is received and must be approved by both Houses within 90 calendar days of continuous session.

Special rules are also provided to expedite congressional action on such a concurrent resolution: a motion to discharge a committee from consideration of a resolution will be in order after 60 days; debate on a motion to discharge is limited to one hour; a motion to proceed to its consideration is highly privileged and is not debatable; debate on the resolution itself is limited to not more than five hours; and a motion to postpone a resolution as well as an appeal from a decision of the Chair are not debatable. A unique provision (subsec. i) stipulates that such a concurrent resolution passed by one House is not to be referred to or considered by a committee in the other House, and the second House is to proceed as if no such resolution has been received from the first House; however, on final passage, if the resolutions are identical, the text of the concurrent resolution of the second House is to be substituted automatically for that of the other House.

Sec. 506 (e). Regulations which the Board of Directors of the Solar Energy and Conservation Bank is authorized to adopt are made subject to congressional review and possible disapproval by joint resolution (according to the procedure provided in the Housing and Community Development Act Amendments of 1978 (see P.L. 95-557, sec. 324; 92 Stat. 2080; 42 U.S.C. 3535 (o)). In effect, this requires submission to Congress semi-annually of an agenda of rules and regulations which the Board has under development associated with exploration, development and production of crude oil or natural gas, will not become effective unless approved by act of Congress.

26. Environmental Emergency Response Act (P.L. 96-510; approved Dec. 11, 1980

Sec. 305. Any rule or regulation promulgated under Title I of this measure must be transmitted to the Senate and the House of Representatives and can be disapproved by the adoption of a concurrent resolution of disapproval by either (1) both Houses within 90 calendar days of continuous session or by (2) one House within 60 calendar days of continuous session, which is not in turn disapproved by the other House within 30 calendar days. If no committee in either House reports or is discharged from such a resolution at the end of 60 days of continuous session, and if neither House within that time adopts such a resolution, the rule or regulation may go into effect immediately. However, if a committee reports or if either House adopts such a resolution within 60 calendar days, the rule or regulation can not become effective until after 90 calendar days of continuous session.

27. National Historic Preservation Act Amendments of 1980 (P.L. 96-515; approved Dec. 12, 1980)

Sec. 501 (new sec. 307). A proposed regulation required by this act must be transmitted to the House Committee on Interior and Insular Affairs and to the Senate committee on Energy and Natural Resources at least 30 days before being published in the Federal Register. Except for an emergency situation, a final regulation will not become effective if both Houses of Congress adopt, within 90 calendar days of continuous session, a concurrent resolution of disapproval. If no committee of either House reports or is discharged from consideration of such a resolution, and if neither House adopts such a resolution within 60 calendar days, the regulation can become effective immediately thereafter. If a committee reports or is discharged from such a resolution within 60 calendar days, the regulation cannot become effective until after 90 calendar days of continuous session.

28. Federal Insecticide, Fungicide, and Rodenticide Act Amendment (P.L. 96-539; approved Dec. 17, 1980).

Sec. 4. Any rule promulgated by the Administrator under this Act must be submitted to Congress and will not become effective if both Houses within 90 calendar days of continuous session adopt a concurrent resolution of disapproval. If within 60 calendar days no committee of either House reports or is discharged from consideration of such a resolution, and if neither House adopts such a resolution, the regulation can become effective immediately thereafter. If a committee reports or is discharged from such a resolution within 60 calendar days, the regulation cannot become effective until after 90 calendar days of continuous session.

29. Farm Credit Act Amendments of 1980 (P.L. 96-592; approved Dec. 24, 1980)

Sec. 508. Any unresolved differences between the Farm Credit Administration and the Federal Reserve Board of Governors, over a regulation implementing certain authority under the Act, must be transmitted to the Senate and the House of Representatives and will not become effective if both Houses adopt a concurrent resolution of disapproval within 90 calendar days of continuous session. If no committee of either House reports or is discharged from consideration of such a resolution, and if neither House adopts such a resolution, within 60 calendar days, the regulation can become effective immediately thereafter. If a committee reports or is discharged from such a resolution within 60 calendar days, the regulation can not become effective until after 90 calendar days of continuous session.

B. PROPOSALS SUBJECT TO LEGISLATIVE VETO WHICH UNDER CERTAIN CRITERIA OR DEFINITIONS MIGHT BE CLASSIFIED AS EXECUTIVE RULES, REGULATIONS OR ORDERS

1. Trade Agreements Extension Act of 1958 (P.L. 85-686; approved August 20, 1958).

Sec. 6. Actions found and reported by the U.S. Tariff Commission to be necessary in order to prevent or remedy certain injuries could become effective under either one of two conditions: (1) if approved by the President: (2) if disapproved by the President but approved within 60 days after a report was submitted to Congress by the adoption of a concurrent resolution of approval by a two-thirds majority in a yea and nay vote in both the Senate and the House of Representatives.

2. Trade Expansion Act of 1962 (P.L. 87-794; approved October 11, 1962).

Sec. 351. Findings by the U.S. Tariff Commission to increase or to impose a duty or other import restriction on an article causing serious injury to an industry were to be reported to the President; unless the President acted upon the finding within 60 days, he was directed to report it to Congress, where the adoption within the next 60 days of a concurrent resolution of approval by a majority of the authorized membership in a yea and nay affirmative vote, would make the Tariff Commission's finding effective without the President's approval.

3. Postal Revenue and Federal Salary Act of 1967 (P.L. 90-206; approved December 16, 1967).

Sec. 225. Recommendations made by the President to Congress in the Budget on the rates of pay he deemed advisable for members of Congress, Judges, and certain other Federal employees would become effective unless a statute with different rates were enacted or unless either the Senate or the House of Representatives "enacted legislation" which specifically disapproved all or part of the recommendations.

4. Federal Pay Comparability Act of 1970 (P.L. 91-656; approved January 8, 1971)

Sec. 3. If the President considered pay adjustment recommendations made by the Federal Employees Pay Council to be inappropriate, an alternative pay plan which he was authorized to transmit to Congress would become effective unless either House of Congress within 30 calendar days adopted a resolution disapproving the alternative pay plan.

5. Education Amendments of 1972 (P.L. 92-318; approved June 23, 1972)

Sec. 411. A schedule of expected family contributions for higher education support under the Basic Educational Opportunity Grants Program, to be published and submitted to Congress not later than February 1 of each year, could be disapproved by either House adopting a resolution of disapproval before the following May 1.

6. War Powers Resolution (P.L. 93-148; approved November 7, 1973).

Sec. 5. Presidential use of armed forces of the U.S. in various kinds of hostilities and situations would have to be terminated within 60 calendar days after he submitted a report to Congress unless Congress enacted specific authorization for such continued use, extended the 60 days period by law, or could not meet physically because of an armed attack.

7. Amendments to the Mineral Leasing Act of 1920 (P.L. 93-153; approved November 16, 1973)

Sec. 101. A Presidential determination that export of domestically produced crude oil would not diminish total quantity in the U.S. and would be in the national interest would not become effective if Congress within 60 days passed a concurrent resolution of disapproval.

8. Department of Defense Authorizations, 1974 (P.L. 93-155; approved November 16, 1973).

Sec. 807. Any obligation, payment or loan in excess of $25 million for future defense contracts must be submitted to Congress and can be disapproved by either House within 60 days of continuous Congressional session.

9. Emergency Petroleum Allocation Act of 1973 (P.L. 93-159; approved November 27, 1973.

Sec. 4. A Presidential exemption for 90 days from mandatory allocations and specified prices for crude oil, residual fuel oil, and refined petroleum products can be disapproved by either House of Congress within 5 days after it was submitted by the President. (Note: a bill [H.R. 4035] that would have extended the time period for disapproval from 5 to 20 days was vetoed by the President in 1975).

10. Atomic Energy Act Amendments of 1974 (P.L. 93-377; approved August 17, 1974).

Sec. 2. Proposals by the Atomic Energy Commission for the amounts and periods of certain special nuclear materials to be distributed to the International Atomic Energy Agency or any group of nations had to be submitted to Congress and referred to the Joint Committee on Atomic Energy for 60 days; within 30 days the Committee was directed to report a concurrent resolution approving or disapproving such proposals, which would not become effective if both Houses adopted a concurrent resolution of disapproval within the 60 day period.

11. Trade Act of 1974 (P.L. 93-618; approved January 3, 1975).

Sec. 203. Presidential determination, contrary to recommendations made by the International Trade Commission, either to provide or not to provide import relief through such actions as increasing duties, fixing tariff quotas, or imposing import restrictions, must be submitted to Congress and can be rejected by the adoption of a concurrent resolution of disapproval within 90 days; if so disapproved, the President must proclaim within 30 days the action recommended by the Constitution.

Sec. 302. A Presidential determination to suspend or withdraw trade agreement benefits with a country which is burdening the commerce of the United States by unjustifiable or unreasonable tariff or other trade restrictions must be reported to Congress and can be disapproved by the adoption within 90 days of a concurrent resolution by a majority vote of those present and voting in each House.

Sec. 151-154. Special rules to expedite consideration of resolutions of approval and disapproval.

12. Amtrak Improvement Act of 1975 (P.L. 94-25; approved May 26, 1975).

Sec. 8. Proposals by the Board of Directors of the National Railroad Passenger Corporation (Amtrak) to add or discontinue routes and services for intercity rail passenger service must be submitted to Congress and may be disapproved by the adoption of a resolution of disapproval by either the Senate or the House or Representatives within 60 days of continuous session.

13. Home Mortgage Disclosure Act of 1975 (P.L. 94-200; approved December 31, 1975).

Sec. 102. Any proposed elimination or reduction in existing rate differentials between interest paid on deposits in effect on December 10, 1975, in any bank insured by the Federal Deposit Insurance Corporation, and interest paid on deposits in savings and loan or other associations insured by the Federal Savings and Loan Insurance Corporation, can not become effective until submitted to Congress by the Federal Reserve System Board of Governors and a concurrent resolution of approval has been adopted by the Senate and the House of Representatives.

14. Naval Petroleum Reserves Production Act (P.L. 94-258; approved April 5, 1976).

Sec. 201. A proposal by the President to extend production from Naval petroleum reserves beyond the six year period authorized by this Act can be disapproved by the adoption of a resolution of disapproval by either House of Congress within 90 days.

15. National Emergencies Act (P.L. 94-412; approved September 14, 1976)

Sec. 202. A national emergency declared by the President can be terminated at the end of each six-month period thereafter by the adoption of a concurrent resolution by both Houses of Congress.

Sec. 202 also provides special rules to expedite consideration of such a concurrent resolution.

16. Federal Land Policy and Management Act of 1976 (P.L. 94-579; approved October 21, 1976

Sec. 204. Withdrawals of public lands aggregating more than 5,000 acres proposed by the Secretary of the Interior for purposes of settlement, sale, location, or entry, will be ineffective if both Houses of Congress adopt a concurrent resolution of disapproval within 90 days.

17. Alaska Natural Gas Transportation Act of 1976 (P.L. 94-586; approved October 22, 1976).

Sec. 8. Presidential designation (by September 1, 1977) of a transportation system for delivery of natural gas from Alaska would not become effective unless Congress passed a joint resolution of approval within 60 calendar days of continuous session.

Sec. 8 also provides special rules to expedite consideration of a joint resolution.

18. Export Administration Amendments of 1977 (P.L. 95-52; approved June 22, 1977).

Sec. 106. Any proposed prohibition or curtailment of authority to export any agricultural commodity, as conferred in the Export Administration Act of 1969, will not be effective if both the Senate and House or Representatives adopt a concurrent resolution of disapproval within 30 days.

19. Department of Energy Act of 1978--Civilian Applications (P.L. 95-238; approved Feb. 25, 1978)

Sec. 107. A plan submitted by the President for the use of funds to repurchase or transport foreign spent nuclear materials for storage or disposition in the United States can be disapproved by the adoption within 30 days of a resolution of disapproval by either House of Congress.

Sec. 107 also provides special rules to expedite consideration of a resolution of disapproval.

20. Nuclear Non-Proliferation Act of 1978 (P.L. 95-242; approved March 10, 1978).

Five different types of proposed executive actions were authorized by this act to be disapproved by the adoption of a concurrent resolution of disapproval by both Houses within 60 days after their submission to Congress:

Sec. 303(a). Any proposed subsequent arrangement for the storage or other disposition in the United States of any foreign spent nuclear irradiated fuel;

Sec. 304(a). A Presidential determination to authorize by Executive Order the export of any production or utilization facility or nuclear source material for which an export license has been denied by the Nuclear Regulatory Commission:

Sec. 306. Any first license or authorization for the export of any production or utilization facility or of any nuclear source material to certain non-nuclear weapon states;

Sec. 307. A Presidential determination that it would be prejudicial to U.S. interest to withhold a proposed export nuclear license which the Nuclear Regulatory Commission has not been able to issue on a timely basis to a nonnuclear-weapon state;

Sec. 401. Certain proposed agreements by the President for cooperation with other nations.

Sec. 308 provides special rules to expedite congressional review procedures.

21. Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372; approved September 18, 1978).

Sec. 208 (new sec. 28). Findings by the President that the export of oil or gas produced from the Outer Continental Shelf would not increase reliance on imported oil or gas, would be in the national interest, and would be in accord with the Export Administration Act of 1969, can be disapproved by the adoption of a concurrent resolution by both Houses within 60 calendar days after being reported to Congress.

22. Amtrak Improvement Act of 1978 (P.L. 95-421; approved October 5, 1978).

Sec. 4. Recommendations by the Secretary of Transportation designating the basic route system for the National Railroad Passenger Corporation (Amtrak) can be disapproved by adoption of an unfavorable resolution by either House of Congress within 90 days.

23. Public Utility Regulatory Policies Act of 1978 (P.L. 95-617; approved November 9, 1978).

Sec. 508. Identification by the President of provisions of Federal law which should by waived, in order to facilitate construction or operation of any crude oil transportation system that he has approved, will become effective only if his proposal is approved by both Houses of Congress adopting a joint resolution of approval within 60 calendar days of continuous session.

24. Natural Gas Policy Act of 1978 (P.L. 95-621; approved November 9, 1978)

Sec. 122. Maximum lawful prices for first sales of natural gas, which the President is authorized to reimpose in the future for a period of 18 months between July 1, 1985 and June 30, 1987, will be subject to disapproval by the adoption of a concurrent resolution by both House of Congress within 30 days after a written order for that purpose might be submitted by the President.

Sec. 507 provides for special rules to expedite consideration of resolutions of disapproval.

25. Export Administration Act of 1979 (P.L. 96-72; approved September 29, 1979)

Sec. 7(d) 2(B). Domestically produced crude oil transported by the Trans-Alaska Pipeline may be exported only if the President publishes express findings that such exports would not be contrary to certain limits and standards specified by law and if both Houses of Congress within 60 days agree to a concurrent resolution approving such exports on the basis of those findings.

26. Emergency Energy Conservation Act of 1979 (P.L. 96-102; approved November 5, 1979)

Sec. 103(b)(1). A proposed rationing contingency plan for gasoline and diesel fuel, which the President was directed to prescribe, is to be considered approved if it is transmitted to Congress in accordance with sec. 552 of the Energy Policy and Conservation Act of 1975 (P.L. 94-163) and is not disapproved by the adoption of a joint resolution passed by both Houses within 30 calendar days. [Note. This modifies for this purpose only the congressional veto procedure authorized by sec. 552 of the 1975 act, which had provided that a proposed energy conservation contingency plan would not become effective unless both Houses adopted an "affirmative resolution" within 60 calendar days. In addition to shortening the period from 60 to 30 days, the 1979 act permits congressional disapproval by means of a joint resolution rather than requiring approval by an "affirmative resolution," which presumably would include a concurrent resolution.]

Except for the procedure outlined below, an approved rationing contingency plan (i.e., one transmitted to Congress by the President and not disapproved by a joint resolution as above or approved by Houses within 30 days according to the procedure in sec. 551 of P.L. 94-163, as amended) may be put into effect by the President only under two conditions: first, if he finds that the plan is required because of a "severe energy supply interruption;" second, if his request to put the plan into effect is not disapproved by either House or is approved by both Houses within 30 days of continuous session after it was transmitted. [Note. The length of the period for congressional review and possible disapproval of Presidentially submitted energy action plans, which had been increased in 1977 (see P.L. 95-52, sec. 110) from 15 days to 60 days of continuous session of Congress, was thus cut in half by this 1979 act to only 30 days of continuous session with respect to the consideration of such a fuel rationing plan.]

The President is authorized to put such an approved rationing plan into effect, however, without a finding of severe energy supply interruption and without submitting it for review and possible disapproval by either House, if he transmits a request to waive these requirements (under sec. 552 of

P L. 94-163) and if both Houses of Congress approve the request for a waiver within 30 days of continuous session. The authority to put an approved rationing contingency plan into effect under this procedure will terminate on the 60th calendar day after the date on which a resolution approving the President's request for such a waiver is adopted by the second House that approves it.

Except for a technical or clerical amendment,an approved rationing contingency plan may not be amended unless, within 15 days after transmittal of the proposed amendment, both the House Committee on Interstate and Foreign Commerce and the Senate Committee on Energy and Natural Resources notify the President in writing that the Committee has no objection to the proposed amendment.

Except for a technical or clerical amendment, a rationing contingency plan which has become effective may not be amended unless the amendment is transmitted to Congress and neither House disapproves it or both Houses approve it within 30 days of continuous congressional session.

The 1979 act (sec. 103) also provides special rules to expedite consideration of resolutions for the approval or disapproval of a rationing contingency plan.

27. Department of Interior and Related Agencies Appropriations for F.Y. 1980 (P.L. 96-126; approved November 27, 1979)

Sec. 303. Mandatory allocation regulations of crude oil, residual fuel oil and refined petroleum products were provided for in the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159). The same act authorized the President to grant an exemption for 90 days that would not become effective if either the Senate or the House of Representatives within 5 days adopted a resolution disapproving such an exemption.

Sec. 303 of P.L. 96-126 subjected to congressional review, approval, or disapproval procedures any proposed increase or decrease for any month in the ratio of the number of entitlements issued to any firm for any imported refined petroleum product. None of the funds appropriated by this act can be used to implement any amendment that would increase or decrease the ratio of the number of a firm's entitlements to the number of barrels of such product imported by that firm above the ratio in effect on April 30, 1979, unless the amendment were transmitted by the President to Congress as an "energy action" under sec. 551 of the Energy Policy and Conservation Act of 1975 (P.L. 94-163). As an energy action, such a proposed amendment to the ratio of the number of entitlements could be disapproved under that law either by the Senate or by the House within 60 days of continuous congressional session, or it could be approved by the adoption of an affirmative resolution by both Houses within the same period.

28. Crude Oil Windfall Profits Tax Act of 1980 (P.L. 96-233; approved April 2, 1980)

Sec. 402. An action by the President to adjust imports of petroleum or petroleum products will not be effective if both Houses of Congress pass a joint resolution of disapproval (no fixed time limit for action by Congress).

29. Marine Protection, Research, and Sanctuaries Act Authorization (P.L. 96-332; approved Aug. 29, 1980)

Sec. 2. The designation of a Marine Sanctuary by the Secretary will become effective unless either the Governor of the State concerned certifies within 60 days that it is unacceptable to his State, or the Senate and the House of Representatives both pass a concurrent resolution of disapproval before the end of 60 days of continuous session, excluding those days on which either House is not in session because of an adjournment of more than three days to a date certain.

30. Multiemployer Pension Plan Amendments Act of 1979 (P.L. 96-364; approved Sept. 26, 1980)

Sec. 102. The Pension Guaranty Corporation is directed to conduct a study and report to Congress every 5 years to determine the premiums needed to maintain the basic-benefit guarantee levels for multiemployer pension plans and whether the benefits may be increased without increasing the premiums.

If the last report indicates that a premium increase is necessary, the Corporation by Mar. 31 must transmit to appropriate congressional committees alternative revised schedules or premiums and benefits, one of which would become effective if approved by Congress by concurrent resolution.

If the last report indicates that basic-benefit guarantees can be increased without increasing the premiums for multiemployer pension plans, the Corporation by Mar. 30 must likewise transmit alternative revised schedules of benefits and premiums that would become effective if approved by passage of a concurrent resolution by both Houses of Congress.

31. Education Amendments of 1980 (P.L. 96-374; approved Oct. 3, 1980)

New sec. 248. Any design proposed by the National Periodical System Corporation to provide reliable and timely document delivery from a comprehensive collection of periodical literature is to be submitted to Congress not later than Dec. 31, 1981, and may not be implemented until the design is approved in whole or in part by enactment of a joint resolution.

32. Alaska National Interest Lands Conservation Act (P.L. 96-487; approved Dec. 2, 1980)

Sec. 1106. An application recommended by the President for a transportation or utility system in certain conservation areas will not become effective unless both Houses of Congress pass a joint resolution of approval within 120 days of continuous session.

Sec. 1326. Any proposed withdrawal of public lands by the President or Secretary within the State of Alaska exceeding 5,000 acres will not be effective until both Houses of Congress are notified and will be terminated in one year unless a joint resolution of approval is passed during that time.

Sec. 1502. A recommendation of the President to permit mineral exploration, development, or extraction in areas not authorized by the bill will become effective only if both Houses of Congress pass a joint resolution of approval with 120 calendar days of continuous session.

CFN/mhb

CONGRESSIONAL VETO OF EXECUTIVE RULES AND REGULATIONS: INTRODUCTION AND DISPOSITION OF APPROVAL AND DISAPPROVAL RESOLUTIONS UNDER AUTHORIZING STATUTES

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This report examines the usage by Congress of its authority reserved in various statutes to review and to approve or disapprove proposed executive rules and regulations. It summarizes the introduction of and subsequent legislative action (if any) on resolutions of approval and disapproval authorized or required by law before particular rules and regulations become effective. The total number of such resolutions introduced and disposed of is compiled and presented in the overall table below. Listed separately also is each relevant act of Congress and the number of resolutions based on provisions in each.

It should be stressed that the number of approval and disapproval resolutions compiled for this report constitute only a fraction of the total introduced in Congress since 1932. Although at least 190 acts with more than 270 separate congressional veto provisions of one type or another have been adopted by Congress in the past 50 years, a large majority of them do not apply to executive rules and regulations. Moreover, criteria applied to statutory provisions for purposes of this report provide a somewhat narrow definition of what is commonly understood to be an executive rule or regulation. Included here are only those laws giving rise to departmental or agency orders of the type which would be classified with little question as such rules and regulations. Excluded, however, are a number of statutes authorizing other kinds of executive proposals which, from a broader perspective, might be considered by some sources to be in a generic sense within the scope of rules or regulations. Among the latter group are such acts as those authorizing disapproval or requiring approval of executive branch proposals and determinations on the following matters: tariffs, imports, and export controls; salary levels and pay adjustments; sales of military equipment abroad; export or storage of nuclear materials; and withdrawal of acreage from public lands.

A total of 125 resolutions of approval or disapproval have been located which were introduced under 14 separate acts that appear to be in accord with the criteria stated above. Most of these were simple resolutions of disapproval needing passage by only one House to become effective, but 16 were concurrent resolutions of approval and a few were joint resolutions of disapproval requiring adoption by both Houses. As to be expected, more than twice as many (79) were introduced in the House of Representatives as in the Senate (46).

Only 14 of the 125 resolutions introduced became effective as a result of the necessary passage by either one or both Houses as required by the statute involved. However, if duplicate passages of concurrent and joint resolutions are counted, a total of 23 separate resolutions were passed by one or the other House. Several did not become effective because of failure of the second House to approve them.

The comparatively small number of approval and disapproval resolutions rejecting rules and regulations, both introduced and passed, seems to be in marked contrast to the increasing interest in and efforts to secure congressional veto authority over such executive proposals. Equally surprising, perhaps, is the limited number and recent dates of the laws under which such actions have occurred. Although Congress has employed procedures of this type for other purposes since 1932, attempts to repudiate rules and regulations (as defined herein) apparently date mainly from the last decade. Even in this latter period they constitute only about one-sixth of all such congressional activities. In the nine years since 1972, when the first resolution recorded in this report was introduced, at least 743 congressional veto resolutions of all types were submitted, 85 of which were passed and became effective. During the same period, as noted, 125 resolutions were introduced and 14 became effective which applied to proposed executive rules and regulations. A large majority of the other resolutions introduced and passed, however, were for the sole purpose of disapproving deferrals of budget appropriations.

SUMMARY OF DATA ON CONGRESSIONAL VETO RESOLUTIONS APPLYING TO RULES AND REGULATIONS

Tables 1 and 2, below, indicate the number and disposition of congressional veto resolutions introduced in each chamber of Congress. Of those introduced, a total of 14 approval or disapproval resolutions were made effective through passage by either or both House of Congress as required by law.

TABLE 1. Number of Congressional Veto Resolutions Introduced in Congress

Type of resolutions	House	Senate	Total
Disapproval	72	37	109
Approval	7	9	16
TOTAL	79	46	125

TABLE 2. Disposition of Resolutions by Senate and House

	Passed by one or both Houses	No legis. action or final vote	Rejected by record vote	Total
DISAPPROVAL RESOLUTIONS				
Senate:	8*	33	0	41
House:	9*	63	0	72
Total	17*	96	0	113
APPROVAL RESOLUTIONS				
Senate:	4*	3	2	9
House :	2*	3	2	7
Total	6*	6	4	16
TOTAL ALL RESOLUTIONS	23*	102	4	129*

* Includes several duplicate passages in each House of concurrent and joint resolutions introduced in the other House as well as passage of simple, concurrent and joint resolutions introduced in House of passage.

INTRODUCTION AND DISPOSITION OF RESOLUTIONS UNDER SPECIFIC AUTHORIZING STATUTES

1. Education Amendments of 1972 (P.L. 92-318; approved June 23, 1972) (authorizing disapproval by either House of regulations for family contributions)

   a. Resolutions introduced

Senate:	S. Res.	2
House:	H. Res.	4
Total		6

   b. Disposition of resolutions

   Senate: no legislative action
   House: no legislative action

2. Education Amendments of 1974 (P.L. 93-380; approved August 21, 1974) (authorizes disapproval by both Houses by concurrent resolution of rules and regulations proposed by Commissioner of Education; also authorizes either House to disapprove guidelines for State financial assistance plans)

   a. Resolutions introduced

Senate:	S. Con. Res.	4
House:	H. Con. Res.	9
	H. Res.	1
	Total	14

   b. Disposition of resolutions

Senate: passed--1 S. Con. Res. and 3 H. Con. Res.
no legislative action--3 S. Con. Res.

House: passed--1 S. Con. Res. and 3 H. Con. Res.
passed--1 H. Res.
no legislative action--6 H. Con. Res.

Total disapproval resolutions enacted: 4 Con. Res. and 1 H. Res.

3. Federal Election Campaign Act Amendments of 1974 (P.L. 93-443; approved Oct. 15, 1974) (authorizes disapproval by either House of rules and regulations)

a. Resolutions introduced

Senate:	S. Res.	1
House:	H. Res.	2
	Total	3

b. Disposition of resolutions

Senate: passed--1 S. Res.
House: passed--1 H. Res.
no legislative action--1 H. Res.

Total disapproval resolutions enacted: 2

4. Motor Vehicle and Bus Safety Amendments of 1974 (P.L. 93-492; approved Oct. 27, 1974) (authorizes disapproval by both Houses by concurrent resolution of motor vehicle safety standards)

   a. Resolutions introduced

Senate:	S. Con. Res.--	2
House:	H. Con. Res.--	10
Total		12

   b. Disposition of resolutions

      Senate: no legislative action
      House: no legislative action

5. Presidential Recordings and Materials Preservation Act of 1974 (P.L. 93-526; approved December 19, 1974) (authorizes disapproval by either House of regulations proposed by GSA Administrator)

   a. Resolutions introduced

Senate:	S. Res.--	2
House:	H. Res.--	2
Total		4

   b. Disposition of resolutions

      Senate: passed-- 2 S. Res.
      House: passed-- 1 H. Res.; reported but not passed--1 H. Res.

      Total disapproval resolutions enacted--3

6. Amtrak Improvement Act of 1975 (P.L. 94-25; approved May 26, 1975) and Amtrak Improvement Act of 1978 (P.L. 95-421; approved Oct. 5, 1978) (both acts authorize either House to disapprove proposed route changes)

   a. Resolutions introduced

Senate:	S. Res.--	4
House:	H. Res.--	10
Total		14

   Disposition of resolutions

      Senate: no legislative action
      House: no legislative action

7. Social Security Act Child Support Amendment (P.L. 94-88; approved Aug. 9, 1975) (authorizes either House to disapprove standards)

   a. Resolutions introduced

      Senate: S. Res.-- 1
      House: 0

      Total 1

   b. Disposition of resolutions

      Senate: no legislative action

8. Energy Policy and Conservation Act (P.L. 95-163; approved Dec. 22, 1975) (authorizes either House to disapprove proposed energy actions and requires both Houses to approve proposed energy conservation plans)

   a. Disapproval resolutions introduced

      Senate: S. Res.-- 12
      House: H. Res.-- 25

      Total disapproval resolutions-- 37

   b. Disposition of disapproval resolutions

      Senate: passed--1 S. Res.; motion to discharge committee defeated--1 S. Res.; motion to consider tabled-- 1 S. Res.; no legislative action-- 9 S. Res.
      House: no legislative action-- 25 H. Res.

   c. Approval resolutions introduced

      Senate: S. Res. -- 8
      House: H. Res.-- 6

      Total approval resolutions introduced-- 14

   d. Disposition of approval resolutions

      Senate: passed by record vote-- 3 S. Res.; rejected by record vote-- 2 S. Res.; no legislative action -- 2 S. Res.; postponed-- 1 S. Res.
      House: passed-- 1 H. Res.; rejected by record vote-- 2 H. Res.; reported-- 1 H. Res.; no legislative action-- 2 H. Res.

   e. Total disapproval and approval resolutions passed under Act-- 5.

9. Federal Election Campaign Act Amendments of 1976 (P.L. 94-283; approved May 11, 1976) (either House may disapprove proposed rules or regulations)

a. Resolutions introduced

Senate: 0
House: H. Res.-- 1

Total 1

b. Disposition of resolutions

House: no legislative action

10. Alaska Natural Gas Transportation Act of 1976 (P.L. 94-586; approved Oct. 22, 1976) (requires approval by joint resolution)

a. Resolutions introduced

Senate: S. Jt. Res.-- 1
House: H. Jt. Res.-- 1

Total 2

b. Disposition of resolutions

Senate: passed (and H. Jt. Res. passed in lieu)-- 1 S. Jt. Res.
House: passed-- 1 H. Jt. Res.

c. Total approval resolutions enacted-- 1

11. Housing and Community Development Amendments of 1978 (P.L. 95-557; approved Oct. 31, 1978) (disapproval of departmental regulations by joint resolution)

a. Resolutions introduced

Senate: 0
House: H. Jt. Res.-- 2

Total 2

b. Disposition of resolutions

House: no legislative action

12. Natural Gas Policy Act of 1978 (P.L. 95-621; approved Nov. 9, 1978) (authorizes either House to disapprove a rule or order for the pass-through of certain natural gas costs and permits disapproval by concurrent resolution of maximum lawful prices on sales if reimposed by President)

    a. Resolutions introduced

    Senate: S. Res.-- 6
    House: H. Res.-- 1

    Total 7

    b. Disposition of resolutions

    Senate: no legislative action
    House: passed-- 1 H. Res.

    Total disapproval resolutions passed-- 1

13. Emergency Energy Conservation Act of 1979 (P.L. 96-102; approved Nov. 5, 1979) (authorizes disapproval by joint resolution of a proposed rationing contingency plan for gasline and diesel fuel)

    a. Resolutions introduced

    Senate: S. Jt. Res.-- 1
    House: H. Jt. Res.-- 4

    b. Disposition of resolutions

    Senate: no legislative action
    House: no legislative action

14. Crude Oil Windfall Profits Tax Act of 1980 (P.L. 96-233; approved April 2, 1980) (authorizes disapproval by joint resolution of Presidential adjustment of imports of petroleum)

    a. Resolutions introduced

    Senate: S. Jt. Res.-- 2
    House: H. Jt. Res.-- 1

    Total 3

    b. Disposition of resolutions

    Senate: no legislative action on S. J. Res.; H. J. Res. indefinitely postponed but similar provision adopted in another bill
    House: passed House-- 1 H. J. Res.

CFN/mhb

CONGRESSIONAL VETOES: 97TH CONGRESS

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ISSUE DEFINITION

Numerous bills and amendments introduced in both Houses of Congress in recent years either have required advance congressional approval or have authorized prior congressional disapproval before certain types of proposed executive actions become effective. These have come to be known collectively as "legislative veto" or "congressional veto" measures. During the 96th Congress alone a total of at least 220 such provisions were offered, 58 of which were enacted in 34 different laws. The large number of bills providing for some kind of congressional veto mechanism submitted to date in the 97th Congress indicates a continuing interest in mandatory congressional review. This brief has two purposes: first, to describe briefly the main features of each kind of congressional veto procedure; and second, to list under appropriate categories all such provisions submitted in the current Congress that have been located.

BACKGROUND AND POLICY ANALYSIS

During the last half century Congress enacted at least 190 laws containing more than 270 separate congressional veto provisions of some type. Adopted sparingly at first, the number of such acts increased markedly in the seventies; more than half of the total were passed in the last decade and nearly one third in the last five years. Likewise, the subject areas in which approval and disapproval procedures may be applied to certain executive proposals has been expanded through the years by legislation to include a rather wide selection of governmental activities, including among others such matters as executive reorganization, foreign affairs, armed services, public works, energy policy, Indian affairs, space administration, watershed protection, atomic energy, petroleum allocation, immigration, education, transportation, salary and pay levels, price controls, and impoundment of appropriated funds. Recent emphasis in an increasing number of bills has been to require congressional review and to permit possible rejection of proposed (and in some cases existing) rules and regulations. Although much discussed, comparatively few such provisions have been enacted into law.

Uniformity or standardization of procedure has not been a leading characteristic of congressional veto devices. To the contrary, as many as 20 separate types can be distinguished, each of which differs with respect to whether advance approval is required or prior disapproval is permitted by either or both Houses of Congress, or committees thereof, and whether action shall be by passing a simple, concurrent or joint resolution, or some combination thereof. Most of the statutory provisions fall within the scope of four major legislative devices: first, disapproval by simple resolution passed by either House; second, disapproval by concurrent resolution passed by both Houses; third, approval by committees of both Houses; and fourth, approval by concurrent resolution passed by both Houses. However, a number of such provisions are distributed among at least 15 other kinds of procedures described below.

In addition to these basic types of congressional veto procedures, it should be noted that there are other variations within them with respect to such other features as time limits (if any) for action by committees or by one or both Houses, length of period before a proposal can become effective, right to waive a portion of the deferral period, kind or size of vote required, and special rules to assure and expedite legislative consideration. If these factors are incorporated in varying degrees in one or more of the basic congressional veto patterns, they tend to complicate an already complex matter. For example, many fix the time limit within which Congress must act on approval or disapproval resolutions at periods varying from as short as 5 days to as long as 6 months, but some have no time limit at all. Likewise, such bills in recent years often propose special Senate and House rules of procedure designed to implement and speed up reference, reports, discharge, floor consideration and debate of approval and disapproval resolutions. While these differences are important and should not be ignored, it is not possible in this brief survey to enumerate them in the listing of individual bills.

Summary descriptions of the basic kinds of congressional veto procedures are arranged below in descending order according to the number of each type enacted by Congress since 1932. Each category also indicates the total number of acts and provisions for each type adopted since then that have been located. Additional summaries are provided for a few current proposals not falling within those categories and which differ fundamentally with previously enacted statutes. For purposes of consistency, congressional veto bills introduced in the 97th Congress, presently numbering at least 120, are listed in the legislation section according to the same pattern, even though strict ranking of each group by quantity might change that order. Likewise, the heading for each type of congressional veto is retained in the listing of current bills, whether or not any provision of that kind has yet been introduced. (For information on veto provisions in the 96th Congress, see IB79044: Congressional Veto Provisions and Amendments: 96th Congress.)

CONGRESSIONAL VETO TYPES

I. Disapproval by Either House Passing a Simple Resolution (56 laws with 92 provisions)

Often referred to as the "one-house veto," about one third of all congressional veto provisions enacted since 1932 authorize either House of Congress to reject a specified executive branch proposal by the passage of a simple resolution of disapproval. In most of these statutes, a proposal must be submitted in advance to both Houses of Congress and will become effective at the end of a stated period unless during that time either House adopts such a resolution. A few such bills permit either House to approve a disapproval resolution proposed by a State or Indian agency. While the length of the congressional review period varies, in nearly half of these provisions it is fixed at 60 days.

II. Approval by Committees of Both Houses (45 laws with 55 provisions)

Second in number of congressional veto provisions enacted (but second in number of acts) is a procedure requiring prior approval by committees in both Houses of Congress before a particular proposal can become effective. Most of these do not restrict the time during which committees may act, but in all cases failure of the appropriate committee (or committees) in either House to grant consent will prevent a proposal from being implemented. A few statutes provide that lack of favorable action by one committee in either House will block the proposal immediately.

III. Disapproval by Both Houses Passing a Concurrent Resolution (40 laws with 54 provisions)

The third most numerous type, sometimes known as the "two-house veto," permits both Houses of Congress to disapprove executive proposals by the adoption of a concurrent resolution. All but two of these provide that, unless such a resolution is passed by both Houses within a specified period of time, the proposal will become effective at the end of that period. A deferral period of 60 days for congressional review is established in about half of these, but others range from 20 to 90 days and at least two have no time limit.

IV. Approval by Both Houses Passing a Concurrent (or Simple) Resolution (16 laws with 27 provisions)

Before certain matters may be carried out, at least 27 provisions have required that prior congressional approval must be obtained through the adoption by both Houses of a concurrent resolution; inasmuch as a few of these do not specify a concurrent resolution, a simple resolution may be used in those cases. In approximately one-third of the provisions of this type, such a resolution must be passed within 60 days, but another third impose no time limit whatsoever.

V. Disapproval by Committee (or Committees) of Either House (9 laws with 11 provisions)

At least 11 separate provisions authorize the appropriate committee (or committees) of either House of Congress to reject certain executive branch proposals. Slightly more than half of these provide that unfavorable committee action must occur within 60 days, but in two cases that period is fixed at 90 days and in one each it is 30 days and 10 days respectively. If a proposal is not disallowed within the stipulated time, it will become effective. Some provisions permit an earlier implementation date, however, if the committee before the end of the period determines that it has no objection and so notifies the agency.

VI. Approval by Both Houses Passing a Joint Resolution (6 laws with 10 provisions)

A number of bills introduced in recent years, several of which have been enacted, employ a joint resolution of approval (or disapproval as noted below) in place of a simple or concurrent resolution for purposes of congressional review. Questions raised about the constitutionality of congressional veto procedures perhaps have stimulated this change. In contrast to a simple or concurrent resolution, a joint resolution, if passed by Congress, must be submitted to the President for his signature. If approved by him, it would become public law; if vetoed by the President, it would fail unless overridden by a two-thirds vote of both Houses.

VII. Disapproval by Both Houses Passing and the President Approving a Joint Resolution (5 laws with 6 provisions)

A few statutes authorize the rejection of certain executive proposals by the passage of a joint resolution of disapproval. Similar to a joint resolution of approval, under the Constitution such a measure must be presented to the President. While this device provides Congress with an opportunity (usually during a limited period) for prior review of a particular matter before it becomes effective, the possibility of a Presidential veto seems to lessen its usefulness as a congressional veto device.

VIII. Agreement with Committees of Both Houses (5 laws with 5 provisions)

Four statutes enacted between 1944 and 1952 required that, bedfore certain military or naval real estate transactions or construction projects could be carried out, the secretaries of the respective departments involved must first "come into agreement" with the appropriate House and Senate committees. A more recent act (P.L. 96-79) directed the secretary of a particular department to "consult with" Senate and House Committees before promulgating certain regulations. Although not specifically conferring power of approval or disapproval as such, these laws do more than stipulate advance notification of proposed executive actions. Under such language restrictions it can be presumed departments probably would hesitate to undertake an action contemplated by the statute if the committees objected. While this congressional review procedure is basically similar to that of approval by committees of both Houses (category III above), it is classified separately here because the consent involved seems to be more informal in nature and might not require specific formal committee ratification as such.

IX. Approval by Both Houses Passing and the President Approving a Bill (3 laws and 3 provisions)

Executive actions proposed under at least three laws may not be implemented unless specific approval is granted by the enactment of subsequent legislation. Very similar to congressional approval by passage of a joint resolution (see category VI above), which also would become public law when passed and signed by the President, this type is distinguished here separately only because approval can be by means of a bill rather than a joint resolution.

X. Disapproval by Committees of Both Houses (2 laws with 2 provisions)

Two acts permit proposed executive actions to be disapproved by committees in both Houses of Congress. In essence this procedure is the reverse of the more than 50 provisions (see category III above) which require approval in advance by committees of both Houses, except that a proposal can become effective in the absence of any committee action.

XI. Approval by Subcommittees of Both Houses (2 laws with 2 provisions)

Two 1978 acts prohibited the obligation and use of certain funds appropriated for the Washington Civic Center (D.C.) until a plan for the Center had been approved by subcommittees in the Senate and the House of Representatives.

XII. Alternative Disapproval by One or by Both Houses Passing a Concurrent

or Simple Resolution (1 law with 1 provision)

Numerous bills in recent years have employed a new congressional review procedure combining features of the so-called one-House and two-House veto. Enacted to date only once (P.L. 96-510), this combined alternative approach, which is sometimes referred to as the "one and one-half type," provides for the rejection of an executive proposal by the adoption of a concurrent resolution (in a few cases by simple resolution) of disapproval by either: (1) both Houses within a specified period (usually 90 calendar days of continuous session); or by (2) only one House within a shorter period (usually 60 calendar days of continuous session), which in turn is not disapproved by the other House within a certain period (usually 30 calendar days of continuous session). Such bills frequently provide also that if no committee in either House reports or is discharged from such a resolution of disapproval by the end of a stated period (usually 60 calendar days of continuous session), and if neither House within that time adopts such a resolution, the proposal can become effective at the end of that period. However, if any committee reports or if either House adopts such a resolution of disapproval within that specified period, the proposal cannot become effective until the longer period has expired.

XIII. Approval by Committee (or Committees) of Either House (1 law with 1 provision)

Although several laws authorize disapproval by a committee of either House (as noted before), only one statute has been located that appears to have required advance approval by a committee of either the Senate or the House of Representatives. An act passed in 1962 (P.L. 87-639) authorized the Committee on Public Works of either House to approve and to direct watershed area investigations and surveys to be conducted jointly by the Secretary of the Army and the Secretary of Agriculture. Although in one sense this may seem to be more in the nature of a directive than an approval procedure, such a proposed joint study could not be made unless at least one committee gave its consent.

XIV. Approval by a Joint Committee (1 law with 1 provision)

In at least one situation prior consent must be obtained from a joint committee before particular proposals can be carried out. Certain classes of work done at printing plants other than the Government Printing Office (GPO), as well as printing in field plants operated by executive agencies or procured by them, according to a 1949 act (63 Stat. 405) are supposed to be approved in advance by the Joint Committee on Printing. A 1968 amendment (P.L. 90-260) further authorized the Joint Committee to approve contracts for printing and binding which the GPO is not able to perform.

XV. Approval by the Chairman of a Committee (1 law with 1 provision)

Under one statute an executive agency must obtain the assent of a committee chairman before carrying out a particular proposal. Congress provided in 1952 (P.L. 82-547) that a Budget Circular controlling certain departmental and agency matters could be amended by the Budget Director only with the prior consent of the Chairman of the House Committee on Appropriations.

XVI. Approval by a Congressional Agency-OTA (1 law with 1 provision)

In 1979 Congress required (P.L. 96-151) that the protocol for a study to be conducted by the Veterans Administration must first be reviewed and approved by the Director of the Office of Technology Assessment (OTA), a congressional agency. The delineation of this procedure as a separate type of congressional veto was underscored by a Presidential veto of a bill that also provided for OTA approval of a similar study to be made by the Secretary of Health, Education and Welfare. Some two weeks after signing the first act, the President vetoed the second on the grounds that requiring advance approval by OTA would be an unconstitutional congressional veto device.

XVII. Approval Within a Specified Period of Time by (1) Adoption of a Favorable Resolution by Both Houses of Congress, by (2) Failure of Both Houses to Take Final Action on an Approval Resolution, or by (3) Adoption of an Approval Resolution by One House Upon Which the Other House Does Not Vote. Disapproval if Either House Fails to Adopt Such a Resolution in Voting on its Final Approval (no law)

Two 1981 executive reorganization bills (S. 893 and H.R. 3270) propose a unique modification of the long-standing procedure for rejection of a reorganization plan submitted by the President to Congress, changing it from a negative disapproval to a positive requirement. While they would reinstate the President's authority to submit reorganization plans to Congress (which expired on April 6, 1981), these bills would substitute approval for disapproval resolutions.

A reorganization plan apparently would become effective under these bills according to any one of three possible alternatives. First, if both Houses of Congress within 90 calendar days of continuous session adopt a resolution of approval; second, if no final action on a resolution of approval is taken by either House before the end of 90 days of continuous session; and third (by implication), if one House of Congress adopts a resolution of approval within 90 calendar days of continuous session but the other House takes no final action on such a resolution during that period. However, it could be rejected by one type of action; if either House during the 90 day period, in a vote on its final approval, fails to adopt such a resolution of approval, the reorganization plan would not become effective.

The first alternative method of approval is similar to that noted earlier whereby both Houses pass a concurrent resolution of approval (see category IV above), except that these bills apparently would permit a simple rather than a concurrent resolution to be used. The other two alternatives would allow a reorganization plan to become effective after the allotted time if neither House took final action on an approval resolution or if one House passed a resolution upon which the other House did not act. However, if either House during the 90-day period in a final vote on a resolution of approval should fail to adopt that resolution, the plan in effect would be disapproved.

XVIII. Disapproval by Both Houses Passing a Concurrent Resolution for Certain Regulations and by Passing a Joint Resolution for Other Regulations (no law)

A distinction is made by one bill (H.R. 3740) in the congressional review procedure to be used for different kinds of regulations. Under this bill any

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major or significant rule proposed by any executive agency which an appropriate committee determines is contrary to law, inconsistent with congressional intent, or exceeds jurisdictional authority, as well as any major or significant rule proposed by an independent regulatory agency, would be subject to disapproval by a concurrent resolution adopted by both Houses. Any other major or significant rule proposed by any other executive agency could be disapproved only by adoption by both Houses of a joint resolution, which would have to be presented to the President for his approval or veto.

XIX. Approval by Two Thirds of the Senate or by Both Houses of Congress (no law)

Under specific conditions and with certain exceptions, one measure (S.J. Res. 31) would provide that no major treaty to which the U.S. is a party could be terminated by the President without the prior advice and consent of the Senate (with two-thirds of the Senators present concurring) or by the advance approval of both Houses of Congress.

XX. Approval, Modification, or Disapproval by Both Houses Passing and the President Approving a Bill or a Joint Resolution (no law)

While similar in part to the procedure of categories VII and IX above, a proposed constitutional amendment (H.J.Res. 64) not only combines the two, but also differs by authorizing an additional step. It provides that Congress shall review and, by appropriate legislation, may approve, modify, or disapprove each proposed rule and regulation before it becomes effective. Thus, not only would advance approval by both Houses be required or prior disapproval by both Houses be permitted, substantive changes also could be made by action of both Houses, subject of course to the subsequent approval of the President. While presumably such action usually would be by means of a bill, the phrase "appropriate legislation" would not rule out the possible use of a joint resolution for this purpose as well.

LEGISLATION

Congressional Veto Bills Introduced in the 97th Congress Listed According to Type of Procedure

I. Disapproval by Either House Passing a Simple Resolution

Senate Bills:

S. 111, Judicial Conference in the Sunshine Act, Sec. 2(a), (DeConcini)

S. 517, Ozone Depletion Validation Act of 1981, Sec. 2, (Bentsen)

S. 576, National Harbor Improvement Act of 1981, Sec. 8(b), (Moynihan)

S. 726, Children and Youth Camp Safety Act, Sec. 7(b), (Weicker)

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S. 815, Department of Defense Authorization Act of 1982, Secs. 206(a)(3) and 901(a)(3), (passed Senate on May 14, 1981; passed House as amended July 16,1981)

S. 1338, Strategic and Critical Materials Stock Piling Revision Act of 1981, Sec. 2(b), (McClure)

S. 1455, National Security and Violent Crime Control Act of 1981, Sec. 405(a), (Biden)

S. 1462, Arid Lands Renewable Resources Corporation Act of 1981, Sec. 304(c), (DeConcini)

S. 1476, Petroleum Disruption Management Act of 1981, Sec. 102(a), (Durenberger)

S. 1503, Standby Petroleum Allocation Act of 1981, Sec. 4(d), (McClure)

House Bills:

H.R. 5, Public Disclosure of Lobbying Act of 1981, Sec. 10(a), (Danielson)

H.R. 97, Congressional Review of Agency Rules, Sec. 1(a), (Ashbrook)

H.R. 171, Congressional Review of Proposed Changes in Postal Services, Sec. 1, (Clay)

H.R. 243, Administrative Rulemaking Control Act, Sec. 3, (Fuqua)

H.R. 219, Amend the Federal Aviation Act of 1958, Sec. 1, (Ferraro)

H.R. 268, Federal Public Assistance Reform Act of 1980, Sec. 3 (b)(2)(B), (Albosta)

H.R. 287, State Legislative and Administrative Procedure Protection Act of 1981, Sec. 3 (Hansen, George)

H.R. 290, Government Executive Analysis and Reform (GEAR) Commission Act of 1981, Sec. 5(c)(2), (Hansen, George)

H.R. 314, Congressional Review of Agency Rulemaking Sec. 1 (a), (Hansen, George)

H.R. 383, Uniform Procedure for Congressional Review of Agency Rules, Sec. 1(a), (Moorhead)

H.R. 457, Health Care Expenditure Regulations Review Act, Sec. 2(b)(2), (Robinson)

H.R. 458, Congressional Review of Agency Rulemaking, Sec. 1 (a), (Robinson)

H.R. 513, Amend the Export Administration Act of 1969, Sec. 5, (Roe)

H.R. 647, Terminate the Department of Energy, Sec. 1, (Whitehurst)

H.R. 722, Prohibit Export of Military Items to South Africa, Sec. 1, (Collins, Cardiss)

H.R. 945, To Prevent Adoption of Rules Contrary to Law or Inconsistent With Congressional Intent, Sec. 2(b), (White)

H.R. 972, Terminate the Department of Energy, Sec. 1, (Guyer) H.R. 1107, Federal Firearms Law Reform Act of 1981, Sec. 105 (c)(1), (Hinson)

H.R. 1128, To Prevent Adoption of Rules Contrary to Law or Inconsistent With Congressional Intent, Sec. 2(b), (Largomarsino)

H.R. 1202, Regulatory Reform Act of 1981, Sec. 5(d), (Whitehurst)

H.R. 1300, Congressional Review of Proposed Changes in Postal Service, Sec. 1, (Corcoran)

H.R. 1413, Handgun Crime Control Act of 1981, Sec. 105(a), (Minish)

H.R. 1554, Youth Camp Safety Act, Sec. 7(b), (Addabbo)

H.R. 1645, Terminate the Department of Energy, Sec. 1, (Hance)

H.R. 1671, Public Disclosure of Lobbying Act of 1981, Sec. 13 (a), (Young, C.W.)

H.R. 1678, Congressional Review of Agency Rulemaking, Sec. 1 (a), (Young, C.W.)

H.R. 1778, To Terminate the Department of Energy, Sec. 1, (Whitehurst)

H.R. 1779, To Terminate the Department of Education Sec. 1, (Whitehurst)

H.R. 1993, Radioactive Waste Research, Development, and Policy Act, Sec. 101(b)(1), (Lundine)

H.R. 2097, Amend the Immigration and Nationality Act, Sec. 1 (b), (Bouquard)

H.R. 2289, To Terminate the Department of Education Sec. 1, (Collins, John)

H.R. 2881, Nuclear Waste Management Policy Act Sec. 105(a), (Derrick)

H.R. 2888, Amend Title 38 to Improve Congressional Oversight of Significant Internal Reorganization of the Veterans' Administration, Sec. 1, (Leath, Marvin)

H.R. 3037, Import Relief Improvements Act of 1981, Sec. 6(b) (2), (Rinaldo)

H.R. 3041, Federal Firearms Dealer and Owner Protection Act of 1980, Sec. 119(3), (Williams, Pat)

H.R. 3300, Protect Firearm Owners' Constitutional Rights, Civil Liberties and Rights to Privacy, Sec. 106(f), (Volkmer)

H.R. 3559, Rail Service Improvement Act of 1981 Sec. 271(a), (Florio)

H.R. 3568, Amtrak Improvement Act of 1981 Sec. 11(a)(B), (Florio)

H.R. 3809, Atomic Energy Act Amendments of 1981, Sec. 115(b), (Udall)

H.R. 3982, Omnibus Budget Reconciliation Act of 1981, Secs. 532(a) (2 provisions), 1107(d), 1142, and 1183(a)(2) (as amended), (Jones, James), (passed House June 26, 1981; passed Senate July 13, 1981; approved Aug. 13, 1981; P.L. 97-35)

H.R. 4292, Regulatory Review Act of 1981, Sec. 3(a), (Hammerschmidt)

H.R. 4295, Health Care Expenditure Regulation Review Act, Sec. 2(b)(2), (Hammerschmidt)

II. Disapproval by Both Houses Passing a Concurrent (or Simple) Resolution

Senate Bills:

S. 384, Federal Expenditure Control Act of 1981, Sec. (b), (Armstrong)

S. 400, Regulatory Conflicts Elimination Act of 1981, Sec. 5(a), (Bentsen)

S. 419, Congressional Review of Agricultural Embargoes, Sec. 1, (Pressler)

S. 684, Rules Review Act of 1981, Sec. 2(a), (Byrd, Harry), (disapproval after petition filed by 20 Members of the Senate and 87 Members of the House, with some exceptions)

S. 828, Ports and Navigation Improvement Act of 1981, Secs. 4 and 6, (Johnston)

S. 869, El Salvador Assistance Plan Act of 1981, Sec. 2(d) (1), (Dodd)

S. 884, Agriculture and Food Act of 1981, Sec. 1102, (Helms)

S. 1150, Amend the Trade Act of 1974, Sec. 3, (Heinz) S. 1155 Consumer Product Safety Act Amendments of 1981 Sec. 11(a), (Kasten)

House Bills:

H.R. 55, Ports and Navigation Improvement Act of 1981, Sec. 4, (Boggs)

H.R. 164, Outer Continental Shelf Lands Act, Sec. 1(a), (Clausen)

H.R. 565, National Employment Priorities Act of 1981, Sec. 29 (a)(b), (Roe)

H.R. 701, Regulatory Conflicts Elimination Act of 1981, Sec. 5(b), (Brown, Clarence)

H.R. 838, Exposure to Cotton Dust Regulation, Sec. 2, (McDonald)

H.R. 1019, U.S. Census Questions, Sec. 1, (Corcoran)

H.R. 1267, Outer Continental Shelf Lands Act, Sec. 1(a), (Panetta)

H.R. 1640, Federal Reserve Accountability Act of 1981, Sec. 2 (by three-fifths vote), (Dorgan)

H.R. 1853, Amend the Clean Air Act, Sec. 1, (Luken)

H.R. 1999, Impose Import Quotas on Automobiles, Sec. 4(b)(2), (Seiberling)

H.R. 2163, Amend the Impoundment Control Act of 1974, Sec. 2, (Rhodes)

H.R. 2249, Ports and Navigation Improvement Act of 1981, Sec. 4, (Breaux)

H.R. 2296, Amend the Clean Air Act, Sec. 1, Part B, (Duncan)

H.R. 2778, Authorize Construction of Modification of Gallipolis Locks and Dam, Ohio River, Ohio and West Virginia, Sec. 2 , (Perkins)

H.R. 2845, Budget Deficit Control Act, Sec. 3(b)(2), (Murtha)

H.R. 3009, El Salvador Assistance Act of 1981, Sec. 2(d)(1), (Solarz)

H.R. 3455, Military Construction Authorization, Sec. 305, (Brinkley) (amendment offered by Simon agreed to by House, June 4, 1981; passed House June 4, 1981)

H.R. 3566, International Security and Development Cooperation Act of 1981, Secs. 101(c)(2) and 107(a), (Zablocki)

III. Approval by Committees of Both Houses

Senate Bills:

S. 480, Food and Agriculture Act of 1981, Sec. 1105, (Melcher)

House Bills:

H.R. 2262, Soil Conservation Act of 1981, Secs. 104 and 503, (Jones, Ed)

H.R. 2330, Authorize Appropriations for the Nuclear Regulatory Commission, Sec. 101(c)(1), (Udall)

H.R. 3512, Supplemental Appropriations and Recission Act of 1981, Sec. 136, (passed House May 13, 1981; passed Senate May 21, 1981; approved June 5, 1981; P.L. 97-12)

H.R. 4121, Treasury, Postal Service, Executive Office of the President, and certain Independent Agencies Appropriations for fiscal year 1982, Sec. 1, (Roybal) (passed House July 30, 1981)

IV. Approval by Both Houses Passing a Concurrent (or Simple) Resolution:

Senate Bills:

S. 95, Nuclear Waste Management Reorganization Act of 1981, Sec. 303(e)(5), (Percy)

S. 354, Amend the Export Administration Act of 1979, Sec. (a), (Dixon)

S. 1354, Emergency Preparedness Act of 1981, Sec. 102(b), (Bradley)

S. 1462, Arid Lands Renewable Resources Corporation Act of 1981, Sec. 305(a), (DeConcini)

House Bills:

H.J. Res. 82, Constitutional Amendment Limiting Appropriations, Sec. 1, (Crane, Philip M.), (three-quarters vote of each House required)

H.R. 56, Foreign Debt Settlement Act, Sec. 1, (Ashbrook)

H.R. 386, Amend the Federal Salary Act of 1967, Sec. 1, (Neal)

H.R. 704, Adjustments of Salaries of Members of Congress, Sec. 1, (Brown, Clarence)

H.R. 832, Congressional Approval of Agency Rules Act of 1981, Sec. 2(a), (Crane, Philip M.)

H.R. 944, Amend the Immigration and Nationality Act, Sec. 107, (White)

H.R. 1129, Congressional Pay Reform Act of 1981 ,Sec. 2(b), (Lagomarsino)

H.R. 2840, Nuclear Waste Policy Act, Sec. 602(d)(2), (Huckaby)

H.R. 3455, Military Construction Authorization Act, 1982, Sec. 305(2), (Brinkley), (passed House as amended June 4, 1981)

H.R. 3647, Suspension of Agricultural Exports, Sec. 1, (Evans, Cooper)

H.R. 3806, Amend Title XVIII of the Social Security Act, Sec. 1, (Mottl)

H.R. 4313, Petroleum Disruption Management Act of 1981, Secs. 102(b)(1), 302(e)(1), 302(e)(2), 305(a), 401(a), and 501(a) (3), (Tauke)

V. Disapproval by Committee (or Committees) of Either House

Senate Bills:

S. 438, Outlays Scheduling and Reporting Act of 1981, Sec. 2(a), (Domenici)

House Bills:

H.R. 9, Apalachicola and Osecola Wilderness Act of 1981, Sec. 4(c), (Fuqua)

H.R. 111, Federal Lobbying Disclosure Act, Sec. 11, (Bennett)

H.R. 1938, Public Building Act Amendments of 1981, Secs. 4(a)(1), 5(b), and 7(b), (Levitas)

H.R. 2136, Amend Title 38 United States Code to Revise the Provisions Relating to National Cemetaries, Sec. 1, (Leath, Marvin), (passed House June 2, 1981)

H.R. 2534, Water Projects Deauthorization Reform Act of 1981, Sec. 6(b), (Fithian)

H.R. 2596, Authorize Appropriations for Panama Canal, Sec. 2(d), (Jones, Walter)

VI. Approval by Both Houses Passing a Joint Resolution

Senate Bills:

S. 668, Priority Energy Project Act, Sec. 37(m)(2)(a), (Jackson)

S. 807, Federal Assistance Improvement Act of 1981, Sec. 10(a), (Roth)

S. 838, Federal Pay Comparability Reform Act of 1981, Sec. 15, (Roth)

S. 1462, Arid Lands Renewable Resources Corporation Act of 1981, Sec. 302(c)(1)(a), (DeConcini)

S. 1476, Petroleum Disruption Management Act of 1981, Secs. 102(b)(1), 103(a)(1)(A) and (B), 103(a)(2), and 103(a) (4)(b), (Durenberger), (approval in 6 days)

House Bills:

H.R. 289, Truth-in-Regulation Act of 1981, Sec. 4, (Hansen, George)

H.R. 3401, Federal Assistance Reform Act of 1981, Sec. 101(a), (Bailey)

H.R. 3680, Federal Assistance Reform Act of 1981, Sec. 101(a), (Heftel)

H.R. 4313, Petroleum Disruption Management Act of 1981, Secs. 103(a)(3)(A), 103(a)(4)(A), 302(f), (Tauke) (approval in 6 days)

VII. Disapproval by Both Houses Passing and the President Approving a Joint Resolution

Senate Bills:

S. 344, Agency Accountability Act of 1981, Sec. 4, (Levin)

S. 1354, Emergency Preparedness Act of 1981, Sec. 103(b), (Bradley)

House Bills:

H.R. 1, Regulation Reform Act of 1981, Sec. 201(a), (Moakley)

H.R. 746, Regulatory Procedure Act of 1981, Sec. 102(b)(1), (Danielson)

H.R. 3140, Federal Pay Comparability Reform Act of 1981, Sec. 15, (Derwinski)

VIII. Agreement With Committees of Both Houses

Senate Bills: None

House Bills:

H.R. 3982, Omnibus Budget Reconciliation Act of 1981, Sec. 516(d)(B), (Jones, James) (as amended) (passed House June 26, 1981; passed Senate July 13, 1981; approved Aug. 13, 1981; P.L. 97-35)

IX. Approval by Both Houses Passing and the President Approving a Bill

Senate Bills: S. 423, Improve Operations of Certain Water Resource Projects, Sec. 1, (Domenici)

House Bills: None

X. Disapproval by Committees of Both Houses

Senate Bills: None

House Bills: None

XI. Approval by Subcommittees of Both Houses

Senate Bills: None

House Bills: None

XII. Alternative Disapproval by One or by Both Houses Passing a Concurrent or Simple Resolution

Senate Bills:

S. 382, Regulatory Reduction and Congressional Control Act of 1981, Sec. 3(a), (Schmitt)

S. 890, Regulatory Reduction and Congressional Control Act of 1981, Sec. 3(a), (Schmitt)

House Bills:

H.R. 1043, Administrative Rule Making Reform Act of 1981, Sec. 4(a), (Ginn)

H.R. 1108, Administrative Rule Making Reform Act of 1981, Sec. 4(a), (Hinson)

H.R. 1330, Congressional Regulatory Review Procedure Act, Sec. 2(a), (Kramer)
H.R. 1776, Administrative Rule Making Reform Act, Sec. 4(a), (Levitas)

H.R. 1973, Fair Housing Amendments Act of 1981, Sec. 7(b), (Railsback)

H.R. 2201, Consumer Product Safety Amendments of 1981, Sec. 4(a), (Broyhill)

H.R. 2299, Administrative Procedure Reform Act of 1981, Sec. 15(a), (Edwards, Micky)

H.R. 3216, Consumer Product Safety Amendments of 1981, Sec. 12(a)(c)(d), (Gramm)

H.R. 3432, Water Resources Policy Act of 1981, Sec. 106(a)(1)(2), (Howard)

H.R. 3745, Consumer Product Safety Amendments of 1981, Sec. 7(a)(c)(d), (Waxman)

H.R. 3964, Omnibus Budget Reconciliation Act of 1981, Sec. 6387(a), (Jones, James)

H.R. 3982, Omnibus Budget Reconciliation Act of 1981, Secs. 1207(a), (c), and (d), (Jones, James) (as amended) (passed House June 26, 1981; passed Senate July 13, 1981; approved Aug. 13, 1981; P.L. 97-35)

XIII. Approval by Committee (or Committees) of Either House

Senate Bills: None

House Bills: None

XIV. Approval by a Joint Committee

Senate Bills: None

House Bills: None

XV. Approval by the Chairman of a Committee

Senate Bills: None

House Bills: None

XVI. Approval by a Congressional Agency--OTA

Senate Bills: None

House Bills: None

XVII. Approval by Both Houses Passing a Resolution of Approval Within a Specified Time or by Congressional Inaction Unless Either House Fails to Pass on Approval Resolution During that Period (no law)

Senate Bills:

S. 893, Reorganization Act of 1981, Sec. 6(a), (Roth), (passed the Senate, June 15, 1981)

House Bills:

H.R. 3270, Reorganization Act of 1981, Sec. 6(a), (Brooks)

XVIII. Disapproval by Both Houses Passing a Concurrent Resolution for Certain Regulations and by Passing a Joint Resolution for other Regulations (no law)

Senate Bills: None

House Bills:

H.R. 3740, Regulatory Control Act of 1981, Sec. 3, (Lott)

XIX. Approval by Two-thirds of the Senate or by Both Houses of Congress

Senate Bills:

S.J. Res. 31, Treaty Terminations Procedures Act of 1981, Sec. 6, (Goldwater) (Two-thirds vote of the Senate required)

House Bills: None

XX. Approval, Modification or Disapproval by Both Houses Passing and the President Approving a Bill or a Joint Resolution

Senate Bills: None

House Bills:

H.J. Res. 64, Amendment Requiring Congress to Review Rules and Regulations Issued to Carry Out any Law, Sec. 1, (Rousselot)

REGULATORY REFORM IN THE 97TH CONGRESS

ISSUE BRIEF NUMBER IB81137

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ISSUE DEFINITION

Over the last decade widespread support has developed for a comprehensive reform of the process by which Federal agencies develop and promulgate their regulations. Rapid expansion of Federal regulatory activities in the areas of health, safety, and the environment, and the resulting costs, have fueled the effort to reform the process. Despite general agreement over the need for reform, considerable controversy exists over procedural and institutional proposals to achieve it. Legislation that pertains to a similar issue -- deregulation -- has also drawn much debate, but is not reviewed here.

BACKGROUND AND POLICY ANALYSIS

The Ford Administration Approach

The present regulatory reform movement relies heavily on the use of cost-benefit analysis to achieve objectives in the cheapest and most efficient manner possible, an approach which, so far as the regulatory agencies are concerned, started during the Ford Administration. On Nov. 27, 1974, President Ford issued Executive Order 11821, requiring executive agencies to consider the inflationary impact of newly issued major regulations and to certify that they had done so. To determine if a regulation was major, agencies had to consider the following factors: (1) cost impact on consumers, businesses, markets, or on Federal, State, or local governments; (2) effect on productivity of wage earners, businesses, or government at any level; (3) effect on competition; and (4) effect on supplies of important products or services. The Office of Management and Budget (OMB) was directed to develop criteria to guide the agencies in their inflationary impact studies and to exercise general oversight responsibility for evaluating agency compliance with the Order.

The Carter Administration Approach

Approximately three and a half years later, on Mar. 23, 1978, President Carter promulgated Executive Order 12044, expanding and refining President Ford's cost-benefit analysis approach and adding additional regulatory reform provisions. Except for independent regulatory agencies, which were asked to comply on a voluntary basis, the order required executive agencies to do the following: (1) conduct a regulatory analysis (cost-benefit analysis) of all proposed and final major regulations; (2) review existing major regulations in order to revise or abolish those no longer effective; (3) prepare semiannual agendas of significant regulations under consideration; (4) increase the opportunity for public participation in rulemaking proceedings; (5) involve the head of each agency in the rulemaking process; (6) establish better management and coordination of regulatory activities within each agency; and (7) write regulations in plain and simple English. All of these provisions have been incorporated, either wholly or in part, in many of the regulatory reform bills introduced in Congress since 1978.

Analysis of major regulations was the key provision in Executive Order 12044. Such an analysis sought to make agencies aware of the costs imposed by major regulations in order to encourage them to select the least costly and burdensome regulation whenever possible. Major regulations were defined

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as those imposing annual costs of $100 million or more on the economy or causing a substantial change in costs or prices for an individual industry, geographic region, or level of government. When developing major regulations, agencies were required to determine the potential costs and benefits of those regulations and feasible alternative regulations that could accomplish the same objective. If a more expensive regulation was selected, the regulatory analysis had to justify the selection. The Regulatory Analysis Review Group, consisting of the major economic and regulatory agencies in the executive branch and chaired by the Chairman of the Council of Economic Advisers, had responsibility for reviewing some of the more important regulations and their regulatory analyses. However, the Review Group could recommend only how an analysis could be improved and a less costly regulation developed. It had no enforcement authority.

The Reagan Administration Approach

President Reagan established a more stringent and enforceable regulatory analysis for proposed and final major regulations when he issued Executive Order 12291 on Feb. 17, 1981. While retaining the two criteria laid down by President Carter for distinguishing major regulations, the Order expanded the definition to include any regulation that had " significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets." To the extent permitted by law, the new Order prohibits executive agencies from issuing a major regulation unless its "potential benefits to society outweigh its potential costs." Moreover, whenever alternative regulatory approaches are considered, the one involving the least net cost to society must be selected. Under the Order, all regulations must be sent to OMB for review, evaluation, and clearance. That Office can designate any regulation or set of regulations as major, thereby making them subject to regulatory analysis (if permitted by law). Furthermore, no proposed regulation can be published until it is cleared by OMB. Finally, as in the earlier Order, agencies are to review their major regulations and to publish semiannual agendas of regulations under development and existing regulations that will be reviewed.

Congressional Considerations

The 96th Congress considered three major bills -- S. 755 H.R. 3263, and S. 2147 -- that would have codified the provisions in President Carter's Executive Order. All three required a regulatory analysis of proposed and final major regulations, a review of existing major regulations, publication of regulatory agendas, increased opportunities for public participation in rulemaking (including intervenor funding), monitoring of agency compliance with the Order (but no enforcement mechanisms), and writing of regulations in plain and simple English. Committee action added two controversial institutional reform provisions to H.R. 3263, one of which was also incorporated in S. 2147. The so-called "Bumpers amendment," requiring a court when reviewing a challenged regulation not to accord it any presumption of validity and, in order to sustain the regulation, to assure that it was based on 'substantial evidence" and was within the agency's statutory jurisdiction, was made part of both bills. Added also to H.R. 3263 by committee amendment was a limited type of congressional veto. This provided that both Houses of Congress could reject major regulations by adopting a joint resolution of disapproval which, of course, would be in turn subject to a Presidential veto.

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Other regulatory reform bills have proposed different types of congressional veto procedures authorizing one or both Houses of Congress, or committees thereof, to disapprove regulations. (See Archived Issue Brief IB79044 for a comprehensive and detailed review of congressional veto provisions and rule amendments in the 96th Congress.)

Sunset legislation, another kind of institutional regulatory reform, would provide for termination of agencies, programs, activities, and individual regulations unless Congress took positive action to continue them. Such proposals usually group agencies and programs into four or five categories, with each category scheduled for review at staggered intervals by appropriate congressional committees. Sunset bills generally require the President and affected agencies to provide information and recommendations to assist the appropriate committees in determining if an agency or program should be continued. Modified versions of sunset proposals requiring periodic congressional review but not termination were also considered in the 96th Congress. Such proposals would terminate agencies or programs only if Congress voted to do so.

Sunset proposals applying to individual regulations generally require that new regulations should include a provision specifying that regulations will terminate after a fixed period, usually 3 to 5 years after their effective date. However, most provide that regulations can be repromulgated before they expire.

Greater and more stringent Presidential oversight and control over regulatory activities of Federal agencies is another major institutional reform goal. Under Executive Order 12044, and by using the Regulatory Analysis Review Group, President Carter sought to increase his control over the development and promulgation of major regulations by executive agencies. He also proposed codifying this authority and extending it over independent regulatory agencies (see S. 755/H.R.3263). However, it remained for President Reagan to impose such authority over executive agencies by E.O. 12291. As noted earlier, that Order imposes stringent and strictly enforced regulatory analysis standards for major regulations and empowers OMB to review and clear all proposed regulations. President Reagan is expected to submit legislation to the 97th Congress to codify the provisions of the Order and extend them to the independent regulatory agencies.

Mention should be made of the Regulatory Flexibility Act (S. 299), passed by Congress and signed by the President in 1980 (P.L. 96-354). The Act seeks to remove or reduce disproportionate regulatory burdens placed on small businesses, organizations, and governmental jurisdictions. In proposing or adopting regulations and in reviewing existing regulations, agencies must endeavor, consistent with law and regulatory objectives, to fit those regulations to the scale of the affected groups.

Philosophical, institutional and practical disagreements triggered by these procedural and institutional proposals have so far hindered, if not prevented, the passage of a comprehensive regulatory reform bill. These differences which continue in the 97th Congress, are discussed briefly below.

Controversy over regulatory analysis focuses on philosophical and practical questions regarding its proper role and scope as well as on ambiguity in interpretation and problems in quantifying both benefits and, to a lesser extent, costs. These problems are particularly acute in the health, safety, and environmental areas where no commonly accepted yardstick exists

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for measuring market values. President Reagan's Executive Order 12291 has heightened concern in this area.

Differences of opinion on the congressional veto center on its constitutionality, its possible politicization of the regulatory process, and its usefulness in helping Congress deal with underlying problems in the regulatory process. Also questioned is its effectiveness in a system where fairly rigid demarcation of committee jurisdiction makes it difficult to obtain the type of comprehensive overview that may be necessary to properly evaluate controversial regulations. The Administration's announcement that the White House would accept a congressional veto provision if it only applied to independent agencies has added to the complexities of the issue.

In the debate over the various sunset proposals, practical and political concerns revolve around the ability of Congress to handle the heavy workload associated with comprehensive, in-depth review and evaluation, and the wisdom of imposing a mechanistic timetable for the automatic termination of programs and agencies. Moreover, there is concern over the possible greater vulnerability of the more recent social programs and agencies.

Enhancing the authority of courts to review agency actions has raised practical and political problems over the wisdom of encouraging greater judicial intervention in agency decisionmaking. Particularly worrisome to many is the possibility that greater authority may enhance the powers of the judiciary at the expense of the executive and legislative branches.

Finally, the dispute over the extent of Presidential authority over regulatory agencies focuses on the possible intrusion of Presidential politics into the regulatory process. Furthermore, increasing such authority creates situations in which "off the record" or _ex part_ discussions and considerations could conceivably be the determining factor in the development of a particular regulation. In such circumstances, neither the Congress nor the reviewing court would be aware of all of the factors involved in a particular decision. Newspaper reports of OMB's attitude under Executve Order 12291 have increased concerns in this area.

LEGISLATION

Numerous regulatory reform bills have been introduced in the 97th Congress; many are identical with or similar to bills introduced in the preceding Congresses. Except for omnibus measures that include all or most of the key provisions described above, these bills are grouped and summarized under the regulatory subject areas with which they deal. Where two or more subject areas are addressed, the bills are reviewed either under the first subject area of concern or the apparent primary area of concern. The bills are grouped under the following categories: omnibus, regulatory analysis; regulatory negotiation; congressional veto; sunset; judicial review; duplicate and conflicting regulations; and Presidential review.

Omnibus

H.R. 746 (Danielson)

Regulatory Procedure Act of 1981. Major provisions include the following: (1) regulatory analysis (cost-benefit analysis) for major regulations, (2) permitting (with an explanation) selection of more costly alternatives;

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preparation of a semiannual agenda of regulations to be considered during the coming year; (3) review of each major regulation within a 10-year period; (4) OMB empowered to establish procedures for agency compliance with regulatory analysis provision and to monitor and review such compliance; (5) congressional veto by joint resolution of newly issued major regulations; (6) reorganization and improvement of agency rulemaking proceedings, including certain hybrid rulemaking procedures; and (7) judicial review (so-called Bumpers amendment) requiring court to accord no presumption in favor of an agency action in questions of law, and to uphold agency action only when supported by substantial evidence or substantial support in the rulemaking file. Judiciary Subcommittee on Administrative Law and Government Relations has held hearings on the bill.

H.R. 1 (Moakley)

Regulation Reform Act of 1981. Similar to H.R. 746, except that it also provides for a permanent House select committee to monitor and review agency rulemaking activities, with power to report a joint resolution to disapprove, delay, or repeal any regulations on which it has issued a report. Referred to the Judiciary and Rules Committees.

S. 1080 (Laxalt et al.)

Regulatory Reform Act. Major provisions similar to H.R. 746, but differs in following respects: (1) no provision for a congressional veto; (2) broader definition of a major regulation; (3) except where law directs otherwise, more stringent regulatory analysis requiring agency to select regulation only after reasonably determining that its benefits justify its costs, and that it is more cost-effective than alternatives considered; (4) President or officer designated by him empowered (a) to select additional regulations to be reviewed within a 10 year period, (b) to designate a regulation as major and establish procedures for agency compliance with regulatory analysis provisions, and (c) to monitor, review, and ensure agency compliance with such provisions; and (5) provision for procedure to eliminate "race to the court house" appeals. Judiciary Subcommittee on Regulatory Reform and Subcommittee on Agency Administration held hearings and the full committee reported the bill on July 17, 1981, and referred it to the Governmental Affairs Committee. (H.R. 3339 is similar to S. 1080, except that it does not include (4)(b) and (c).)

Regulatory Analysis (cost/benefit analysis)

H.R. 259 (Guyer), H.R. 1984 (Levitas)

A bill to amend the Administrative Procedure Act. For all regulations, requires an economic impact analysis focusing on the cost of all regulations and their effects on employment, productivity, competition, and supplies of important products and services. Referred to the Judiciary Committee.

H.R. 300 (Hansen of Idaho)

Regulatory Procedures Improvements Act of 1981. For all major regulations requires a regulatory analysis similar to that found in H.R. 259; terminates major regulations within 5 years of their effective date unless repromulgated; requires a paperwork impact analysis for regulations imposing a major paperwork burden on 10 or more members of the public. Referred to the Judiciary Committee.

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S. 405 (Dole et al.)

Regulatory Reform Act of 1981. Requires a regulatory analysis of new regulations, the sunset of existing regulations, and opportunity for greater public participation in the rulemaking process. New regulations could be issued only when benefits outweigh costs and when they offer the lowest costs and fewest adverse effects of the alternatives considered. Existing regulations expire within 5 years of the enactment of the bill and new regulations within 5 years after they are issued, except for those repromulgated under the same limitations imposed on new regulations. Provides for greater public participation in rulemaking and for certain hybrid procedures, including cross-examination of witnesses to resolve critical issues. Referred to the Judiciary Committee.

H.R. 700 (Brown of Ohio)/S. 401 (Bentsen)

Regulatory Cost Reduction Act of 1981. Provides for regulatory analysis of regulations meeting certain criteria established by the President and for periodic review of existing regulations. If a more costly or more cost-effective regulation is selected, the regulatory analysis must justify such selection and explain how the national interest required that choice. Agencies must review their existing regulations within 5 years of the bill's enactment in order to eliminate unnecessary regulations, clarify language where appropriate, and modify them when necessary. Referred to the Judiciary Committee.

Congressional Veto of Regulations

Simple resolution (One-House Veto)

H.P. 97 (Ashbrook)

Congressional Review of Agency Rulemaking. Authorizes either House to veto, within a specified time period, a new regulation by a simple resolution of disapproval, and establishes procedures to expedite consideration of such a resolution. Increases to 60 days the public comment period following a notice of proposed rulemaking. Referred to the Judiciary and Rules Committees. (Similar bills include H.R. 314, H.R. 383, H.R. 458, H.R. 945, H.R. 1126, and H.R. 1678.)

Modified concurrent resolution (One-and-a-Half House Veto)

H.R. 1320 (Kramer et al.)

Congressional Regulatory Review Procedure Act. Authorizes Congress within a specified time period, to reject new regulations by a resolution of disapproval and to terminate existing regulations by a resolution for reconsideration if either House adopts such a resolution and the other House does not disapprove the action. An existing regulation affected by a reconsideration resolution lapses within 180 days unless it is repromulgated and submitted to Congress for review and possible veto. Establishes expedited procedures for consideration of disapproval and reconsideration resolutions. Referred jointly to the Judiciary and Rules Committees.

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Modified concurrent resolution and simple resolution

H.R. 1776 (Levitas and over 220 sponsors)

Administrative Rule Making Reform Act. Authorizes Congress, within a specified time period, to reject new regulations by a modified concurrent resolution of disapproval (same as H.R. 1330). An agency may be directed by either House to reconsider an existing regulation, which will lapse after 60 days (for rules promulgated within 90 days) or after 180 days (for other extent rules) unless it is repromulgated. If the latter occurs, the regulation will be subject to Congressional review and disapproval according to the procedure for new regulations. Expedited procedures are similar to those in H.R. 1330. Opportunity for public participation is increased providing for an additional comment period and certain hybrid rulemaking procedures. Referred jointly to the Judiciary and Rules Committees.

S. 890 (Schmitt)

Regulatory Reduction and Congressional Control Act of 1981. Contains same procedures for disapproval and reconsideration resolutions as H.R 1776, except that the reconsideration resolution applies only to existing regulations. Provisions for expanded public participation and expedited procedures also are similar to those in H.R. 1776. Referred to Judiciary Committee.

Concurrent Resolution (Two-House Veto)

S. 684 (Byrd of Virginia)

Rules Review Act of 1981. Requires that 20% of the Members of either House sign a petition within a specified period requesting that a new regulation be review before such a regulation can be vetoed by a concurrent resolution of disapproval. Empowers the President to exempt from a veto those regulations required by national defense, foreign policy, or emergency circumstances. Referred to the Judiciary Committee.

Concurrent Resolution and Joint Resolution (Congress and President)

H.R. 3740 (Lott)

Congressional Review of Agency Rulemaking. Authorizes Congress, within a specified time period, to veto major and significant regulations by a concurrent or joint resolution of disapproval depending on the circumstances. Executive agency regulations that are contrary to law or the intent of Congress, and all independent regulatory agency regulations, can be rejected by a concurrent resolution of disapproval; executive agency regulations disapproved for other reasons and repromulgated existing regulations can be vetoed by a joint resolution of disapproval. There is also a provision for the review of existing major regulations. Referred jointly to the Judiciary and Rules Committees.

S. 344 (Levin and Boren)

Agency Accountability Act of 1981. Authorizes Congress to veto new significant regulations by a joint resolution of disapproval. Requires agencies to prepare semiannual agendas of significant regulations to be proposed during the coming year. Referred to the Governmental Affairs Committee.

Two-House approval

H.R. 822 (Philip Crane)

Congressional Approval of Agency Rules Act of 1981. Newly issued regulations must be approved by both Houses before they can become effective. Moreover, they must be accompanied by economic impact statements indicating the projected costs of implementation and projected effects on certain economic indicators. Similar economic impact statements on existing regulations must be submitted to Congress within 180 days after the bill is enacted. Referred to the Judiciary Committee.

Sunset of Programs and Agencies

H.R. 2 (Blanchard)

Sunset Act of 1981. Limits to 10 year periods most Government programs, including tax expenditures, and requires that they be reauthorized according to a staggered schedule within a 10-year cycle. Programs not reauthorized during that cycle cannot be funded. Directs the President to prepare a regulatory duplication and conflicts report and to make recommendations for all programs scheduled for reauthorization. The appropriate legislative committee of jurisdiction is to evaluate the cost-effectiveness of such programs and to recommend their continuation, modification, or termination. Referred jointly to the Government Operations and the Rules Committees.

H.R. 58 (Long)

Sunset Review Act of 1981. Provisions are similar to those found in H.R. 2, except that H.R. 58 does not establish a reauthorization review cycle. Moreover, instead of barring funds for programs that have not been reauthorized, H.R. 58 forbids the consideration of primary expense resolutions for legislative committees that have not developed and submitted sunset review agendas for programs under their jurisdiction. Referred to the Rules Committee.

S. 856 (Baucus)

Legislative Oversight Act of 1981. New budget authorization, new or increased tax expenditures, and new spending authority are limited to a 5 year period. Requires agencies to describe the objectives and costs of their programs in annual reports to Congress and directs the President to describe in his budget the relationship between his recommendations on program budgets and the accomplishments of those programs as reported by the agencies. Directs Congress to review and evaluate programs in order to determine if they should be continued, modified, or terminated. No bill or resolution authorizing new budget authority or providing new or increased tax expenditures can be considered unless the accompanying report notes the program costs and accomplishments. Referred jointly to the Budget and Governmental Affairs Committees.

S. 1456 (Kennedy and Leahy)

Regulatory Improvements Act of 1981. Provides for a fixed 10-year period systematic review by the President and Congress of the effectiveness of regulatory programs having a significiant impact on the economy. The review and evaluation is to be conducted in a two-stage process: First, the President evaluates the regulatory programs, proposes regulatory reform legislation, and prepares a report; second, appropriate committees of Congress review, amend (if necessary), and report out the regulatory reform legislation. Regulatory programs are not terminated if Congress fails to act on the reform legislation. Referred jointly to the Judiciary and the Government Affairs Committees.

Judicial Review

S. 67 (Bumpers et al.)/H.R. 1866 (Synar)

Administrative Procedure Act Amendments of 1981. Establishes the same criteria as those in H.R. 746 for a court review of challenged regulations, for increased public participation in agency rulemaking, and for expediting certain proceedings. Referred to the Judiciary Committee.

Regulatory Budget

H.R. 703 (Brown of Ohio)/ S. 399 (Bentsen)

A bill to amend the Congressional Budget Act of 1974. Requires Congress to establish for each agency a yearly regulatory budget setting the maximum costs of compliance with the regulations issued by the agency. Provides procedures for exceeding the maximum compliance costs established for each agency. Referred to the Rules Committee.

Regulatory Negotiation

H.R. 1336 (Pease)

Regulatory Negotiation Commissions Act of 1981. Provides for the creation and funding of five regulatory negotiation commissions whose purpose would be to modify the existing adversarial relationship between regulator and regulatee. Limits the commissions' role to reports and recommendations in the regulatory areas of health, safety, and the environment and stipulates that they must have balanced representation from business, local government, and public interest groups. Establishes additional criteria that commissions must meet in order to receive funding. (S. 1350, Levin, providing for 10 regulatory commissions, is very similar.) Referred jointly to the Judiciary and the Government Operations Committees.

S. 1601 (Roth et al.)

Regulatory Mediation Act of 1981. At request of agency or interested person, Chairman of Administrative Conference of the United States (ACUS) may recommend creation of regulatory negotiabion committee, including competent and balanced membership whose interests would be substantially affected by proposed regulation. Provides for agency participation in committee deliberations and votes, and requires unanimous vote for adoption of proposed regulation. Enables agency to modify recommended regulation, but requires publication for public comment of proposed changes along with the original negotiated regulation. Allows agency to further amend regulation after comment period. Requires agency to pay expenses of committee. Referred to the Judiciary Committee.

Duplicate and Conflicting Regulations

H.R. 701 (Brown of Ohio)/S. 400 (Bentsen)

Regulatory Conflicts Elimination Act of 1981. Requires the Office of Management and Budget to prepare an annual report indentifying duplicative or conflicting regulations and their costs, and recommending their modification, elimination, or consolidation. Directs the President and independent agencies to send Congress annual reports recommending changes in conflicting and duplicative regulations and stipulates that the recommendations be implemented within 60 days unless they are disapproved by a concurrent resolution. Referred to the Judiciary Committee.

Presidential Review of Independent Agency Regulations

H.R. 3802 (McClory)

Accountability in Regulatory Rulemaking Act of 1981. Gives the President the same review and control authority over regulations proposed by independent agencies that he has over those proposed by executive agencies. The President, unless prohibited by law, could require by written directive an independepent agency to do the following: (1) send him notice of any proposed regulation before it is published; (2) delay or refrain from publishing such notice; (3) consider, reconsider, or make a final decision regarding the adoption of such regulation; or (4) take any action regarding the regulation that is legal, justified, and necessary or appropriate. Referred to the Judiciary Committee.

HEARINGS

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on Oversight and Investigations and Subcommittee on Consumer Protection and Finance. Use of Cost-Benefit analysis by regulatory agencies. Joint hearings, 96th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1979. 482 p.
Hearings held July 30, Oct. 10 and 24, 1979.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Administrative Law and Governmental Relations. Regulation Reform Act of 1979. Hearings, 96th Congress, 1st and 2d sessions, on H.R. 3263. Washington, U.S. Govt. Print. Off., 1980. 2 v.
Hearings held Nov. 7, 13, 16, 28, Dec. 3, 5, 10, 1979, Jan. 29, Feb. 1 and 5, 1980.

U.S. Congress. House. Committee on Rules. Subcommittee on the Legislative Process. Sunset, sunrise, and related measures. Hearings, 96th Congress, 1st session,

on H.R. 2, 65, and H.R. 5858. Washington, U.S. Govt. Print. Off., 1979. 2 v.
Hearings held in Washington, D.C., Apr. 4, May 10, 23, June 5, 20, July 13, 30, Nov. 29 and Dec. 5, 1979, and in Columbia, S.C., Nov. 12, 1979.

U.S. Congress. House. Committee on Rules. Subcommittee on Rules. Regulatory reform and congressional review of agency rules. Hearings, 96th Congress, 1st session, on H.R. 1776, "The Administrative Rule Making Reform Act," and related measures. Washington, U.S. Govt. Print. Off., 1979. 3 v.
Hearings held in Washington, D.C. July 11, Sept. 12, 26, Oct. 24, 31, Nov. 15, in Dallas Tex., Aug. 13, and in Salisbury, Md., Oct. 15, 1979.

U.S. Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee for Consumers. Cost of Government regulations to the consumer. Hearings, 95th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1979. 429 p.
Hearings held Nov. 21-22, 1978.

U.S. Congress. Senate. Committee on Government Operations. Regulatory reform--1975. Hearings, 94th Congress, 1st session, pursuant to S. Res. 71, To authorize a study of the purpose and current effectiveness of certain Federal agencies. Washington, U.S. Govt. Print. Off., 1975. 443 p.
Hearings held Oct. 29-30, Dec. 5 and 19, 1975.

U.S. Congress. Senate. Committee on Governmental Affairs. Regulatory reform legislation. Hearings, 96th Congress, 1st session, on S. 262, S. 755, S. 445, S. 86 and other regulatory reform legislation. Washington, U.S. Govt. Print. Off., 1979. 2 v.
Hearings held Mar. 20, Apr. 6, 24, May 3-4, 16 and 18, 1979.

----- Sunset for regulatory agencies. Hearings, 96th Congress, 1st session, on S. 455 and Title V of S. 2. Washington, U.S. Govt. Print. Off., 1979. 194 p. Hearings held May 23 and June 15, 1979.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Regulatory reform. Hearings, 96th Congress, 1st session, on regulatory reform. Washington, U.S. Govt. Print. Off., 1979. 4 v.
Hearings held May 10, 15, June 13, July 18, 20, 25-26 and Aug. 20, 1979.

----- Regulatory reform. Hearings, 96th Congress, 1st session, on S. 104, S. 262, S. 299, S. 755, and S. 1291. Washington, U.S. Govt. Print. Off., 1979. Vol. 3. 372 p.
Hearings held June 21 and Aug. 8, 1979.

U.S. Congress. Senate. Select Committee on Small Business

and the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs. Regulatory negotiation. Hearings, 96th Congress, 2d session, on regulatory negotiation. Washington, U.S. Govt. Print. Off., 1980. 181 p.
Hearings held July 29-30, 1980.

REPORTS AND CONGRESSIONAL DOCUMENTS

U.S. Congress. House. Committee on Interstate and Foreign Commerce. Subcommittee on Oversight and Investigations. Cost-benefit analysis: wonder tool or mirage? Washington, U.S. Govt. Print. Off., 1980. 49 p.
At head of title: 96th congress, 2d session. Committee Print.

----- Federal regulations and regulatory reform. Washington, U.S. Govt. Print. Off., 1976. 749 p.
At head of title: 94th Congress, 2d session. Subcommittee Print.

U.S. Congress. House. Committee on the Judiciary. Regulation Reform Act of 1980; report to accompany H.R. 3263, 96th Congress, 2d session, Washington, U.S. Govt. Print. Off., 1980. 128 p. (96th Congress, 2d session. House. Report no. 96-1393.)

U.S. Congress. House. Committee on Rules. Recommendations on establishment of procedures for congressional review of agency rules. Washington, U.S. Govt. Print. Off., 1980. 47 p.
At head of title: 96th Congress, 2d session. Committee Print.

U.S. Congress. Senate. Committee on Governmental Affairs. Agency Accountability Act of 1980; report to accompany S. 1945, 96th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1980. 25 p. (96th Congress, 2d session. Senate. Report no. 96-965.)

----- Principal recommendations and findings of the Study on Federal Regulation, volumes I-VI. Washington, U.S. Govt. Print. Off., 1979. 54 p.
At head of title: 96th Congress, 1st session. Committee Print.

----- Study on Federal regulation. Washington, U.S. Govt. Print. Off., 1977. 6 v.
At head of title: 95th Congress, 1st session. Committee Print. "Prepared pursuant to S. Res. 71, to authorize a study of the purpose and current effectiveness of certain Federal agencies."
Contents.--Vol. I. The regulatory appointments process.--Vol. II. Congressional oversight of regulatory agencies.--Vol. III. Public participation in regulatory agency proceedings. Vol. IV. Delay in the regulatory

process.--Vol. V. Regulatory organization.--Vol. VI. Framework for regulation and case studies (Appendix).
Vols. I and II were by this committee under an earlier name, the Committee on Government Operations.

----- Sunset Act of 1980; report to accompany S. 2, 96th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1980. 98 p. (96th Congress, 2d session. Senate. Report no. 96-865.)

U.S. Congress. Senate. Committee on Governmental Affairs and the Committee on the Judiciary. Reform of Federal regulation; joint report to accompany S. 262, 96th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1980. 2 v. (96th Congress, 2d session. Senate. Report no. 96-1081, Parts 1 and 2.)

U.S. Congress. Senate. Committee on the Judiciary. Regulatory Flexibility Act; report to accompany S. 299, 96th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1980. 21 p. (96th Congress, 2d session. Senate. Report no. 96-879.)

U.S. Congress. Joint Economic Committee. The costs of Government regulation of business; a study prepared for the use of the Subcommittee on Economic Growth and Stabilization. Washington, U.S. Govt. Print. Off., 1978. 29 p.
At head of title: 95th Congress, 2d session. Joint Committe Print.

CHRONOLOGY OF EVENTS

07/17/81 -- S. 1080 referred to Senate Committee on Governmental Affairs by Committee on the Judiciary.

05/15/81 -- Senate Judiciary Subcommittee on Agency Administration began hearings on S. 1080.

05/14/81 -- Senate Judiciary Subcommittee on Regulatory Reform began hearings on S. 1080.

05/12/81 -- Senate Committee on Governmental Affairs began hearings on S. 344 and S. 1080.

04/02/81 -- House Judiciary Subcommittee on Administrative Law and Government Relations began hearings on H.R. 746.

02/17/81 -- President Reagan issued Executive Order 12291.

01/29/81 -- President Reagan issued a memorandum freezing the implementation and promulgation of regulations for 60 days.

01/22/81 -- President Reagan established the Presidential Task Force on Regulatory Relief to review pending regulations, study existing regulations for possible revision, and recommend appropriate legislative remedies for regulatory problems.

12/11/80 -- H.R. 6410 (Paperwork Reduction Act) signed into law (P.L. 96-511).

11/18/80 -- Office of Management and Budget issued evaluation of agency compliance with E.O. 12044, entitled "Report on Improving Government Regulations". (An earlier report was issued 09/17/79.)

10/10/80 -- Senate Governmental Affairs Committee and Judiciary Committee issued joint report on S. 262 (S. Rept. 96-1018, Parts 1 and 2).

09/25/80 -- House Judiciary committee reported H.R. 3263, Regulation Reform Act, with amendments (H. Rept. 96-1393).

09/19/80 -- S. 299 (Regulatory Flexibility Act) signed into law (P.L. 96-354).

11/27/79 -- House Rules Committee began hearings on H.R. 5858 (Sunset Review Act of 1979, which dropped the automatic termination provision).

11/07/79 -- House Judiciary Subcommittee on Administrative Law and Government Relations hearings on H.R. 3263 (Regulation Reform Act of 1979).

07/13/79 -- Senate Judiciary Subcommittee on Administrative Practice and Procedures began hearings on S. 104 (Regulatory Reduction and Congressional Control Act), S. 262, S. 299 (Regulatory Flexibility Act), S. 755, and S. 1291 (Administrative Practice and Regulatory Control Act of 1979).

07/11/79 -- House Rules Subcommittee on Rules of the House began hearings on H.R. 1776 (The Administrative Rule Making Reform Act), and related bills (H.R. 512 and H.R. 601).

04/04/79 -- House Rules Subcommittee on the Legislative Process began hearings on H.R. 2 (Sunset Act of 1979), H.R. 65 (Legislative Oversight Act of 1979), and H.R. 2364 (Regulatory Reform Act of 1979).

03/20/79 -- Senate Governmental Affairs Committee began hearings on S. 262 (Reform of Federal Regulations Act of 1979), S. 755 (Regulation Reform Act of 1979), S. 445 (Regulatory Reform Act of 1979), S. 93 (Regulatory Procedures Improvements Act of 1979), and Title V of S. 2 (Sunset Act of 1979).

02/28/79 -- First edition of the Calendar of Federal

Regulations is issued by U.S. Regulatory Council.

10/31/78 -- President Carter established the U.S. Regulatory Council, to help eliminate duplicate and overlapping regulations and to compile the Calendar of Federal Regulations.

10/14/78 -- Senate passed S. 1974, amended (Regulatory Flexibility Act).

10/11/78 -- Senate passed S. 2 (Sunset Act of 1977) after attaching S. 600 (Regulatory Reform Act of 1977) to it.

03/24/78 -- President Carter issued Executive Order 12044, "Improving Government Regulations."

01/--/78 -- President Carter established the Regulatory Analysis Review Group.

01/27/77 -- The Regulatory Appointments Process, volume 1 of a 6 volume Study on Federal Regulation authorized by S.Res. 71 issued by the Senate Committee on Government operations. Volume 6 was released in December 1978.

01/11/77 -- The Challenge of Regulatory Reform: A Report to the President prepared by the Domestic Council Review Group on Regulatory Reform, released.

10/--/76 -- House Commerce Subcommittee on Oversight and Investigations released a study entitled "Federal Regulation and Regulatory Reform."

07/26/76 -- Senate passed S.Res. 71, "To Authorize a Study of the Purpose and Current Effectiveness of Certain Federal Agencies."

01/27/74 -- President Ford issued Executive Order 11821, "Inflation Impact Statements."

ADDITIONAL REFERENCE SOURCES

Bruff, Harold H., and Ernest Gellhorn. Congressional control of administrative regulation: a study of legislative vetoes. Harvard law review, v. 90, May 1977: 1369-1440.

Clark, Timothy B., Marvin H. Kosters, and James C. Miller III, editors. Reforming regulation. A conference sponsored by the American Enterprise Institute for Public Policy Research and the National Journal. Washington, American Enterprise Institute, 1980 162 p.

Lilley, William, III, and James C. Miller III. The new "social regulation." Washington, American Enterprise Institute, 1977 49-61 p. (American Enterprise Institute for Public Policy Research. Reprint no. 65.)

McGraw, Thomas K. Regulation in America: a review article. Business history review, v. 49, Summer 1975: 159-183.

Proceedings of the National Conference on Federal Regulation: Roads to reform. Administrative law review, v. 32, Spring 1980: whole issue.

U.S. Domestic Council. Review Group on Regulatory Reform. The challenge of regulatory reform; a report to the President. Washington, U.S. Govt. Print. Off. 1977. 72 p.

U.S. Library of Congress. Congressional Research Service. Costs and benefits of Federal regulation: an overview by Julius W. Allen. Washington 1978. 111 p.
CRS Report no. 78-152 E.

----- Estimating the costs of Federal regulation: review of problems and accomplishments to date by Julius W. Allen. Washington 1978. 74 p.
CRS Report no. 78-205 E.

----- The proposal for a Federal regulatory budget -- an overview by Julius W. Allen. Washington 1978. 24 p.
CRS Report no. 78-197 E.

----- Congressional action to overturn agency rules: alternatives to the "Legislative veto" by Frederick M. Kaiser. Washington 1979. 77 p.
CRS Report no. 79-205 Gov.

----- The issue of Federal economic regulation, 1973-1978: a selective bibliography by Richard Gigax. Washington 1978. 32 p.
CRS report 78-164 L.

----- Presidential control of agency rulemaking: an analysis of constitutional issues that may be raised by executive order 12291 by Morton Rosenberg. Washington 1981. 146 p.
CRS Report issued June 15, 1981.

U.S. Ofice of Management and Budget. Improving government regulations: a progress report. Washington 1980. 61- p.

Mr. MOAKLEY. Do you think the distinction you make between the way you handle executive agencies and independent agencies is clear enough to avoid confusion?

Mr. LOTT. I think it is. I think it is important also that you differentiate between the two, and that is one of the problems I have with the Levitas bill. I think independent agencies are more of a creature under our control in most instances where the executive branch, there is clearly a greater argument for the administration there. But we also add that appeal right. Maybe that part of it would not be acceptable, but it is a further protection for the administration in answer to their concerns that we would infringe upon the executive branch too much.

Mr. MOAKLEY. As I remember, I think your original bill just dealt only with major and significant rule changes?

Mr. LOTT. That is right.

Mr. MOAKLEY. H.R. 4838, your latest bill, deals with all of them?

Mr. LOTT. Yes.

Mr. MOAKLEY. Can you tell me why you changed your mind on that?

Mr. LOTT. Yes. No great big secretive factor. I really feel that we should deal with all of them, and I do not think we ought to just deal with certain ones. There are problems in both areas, and I think it adds greater weight to what we are trying to do. If we should have it in one area we should have it in others. As I talked to my staff, I felt we ought to go the whole route.

Mr. MOAKLEY. If Congress were to pass a generic legislative veto, do you think the agencies would go to the adjudicative process to change the rules?

Mr. LOTT. They could. That would be a route some might take, but I think with our oversight and with this control over rulemaking we would have a way to rein that in. We would have to try to control it, but some of them might try to do it; yes.

Mr. MOAKLEY. Mr. Beilenson.

Mr. BEILENSON. Thank you, Mr. Chairman. It is obvious, I guess, to anyone in these hearings that my bias has developed in opposition to any such bills. I am not awfully objective about them.

Mr. LOTT. You are opposed to legislative veto of any kind?

Mr. BEILENSON. Yes. Would you be opposed to accepting an amendment which would prohibit anyone from being one of those signers on the front-end discharge mechanism who had received any political action committee contribution from the particular interest who is seeking the undoing of a particular issue?

Mr. LOTT. You know, from a legislative standpoint, I am not sure that that would be the kind of thing we would want to do, but, you know, if it would make a difference, if you feel it would provide protection, I would not have any particular problem with it.

Mr. BEILENSON. It seems to me that is an obvious problem here. Somebody submits a rule, or the independent agency proposes a rule, that is contrary to the generally perceived interests of the X industry, so the X industry calls upon all of its friends, most of whom it has given PAC campaign contributions to the previous year, to sign the discharge. I think you have a conflict of interest, and it will put the Congress in disrepute.

Mr. **Lott**. I understand what you are saying. I want to be flexible in this area, because I do feel like it is something that we need to do. I do feel we need the legislative veto. I am optimistic, although we cannot totally destroy the concept, and what you are asking would. I prefer to assume that Members of Congress are good and ethical people and where there is a potential for conflict of interest like that, if they know it that they would waive that potential charge or that conflict and would opt not to do it. I would rather not put that sort of thing in the law. I would rather handle that more within the House.

Mr. **Beilenson**. There is enough of a potential conflict when you have a vote on legislation that affects an interest that contributed heavily to your campaign. You cannot avoid that in most cases.

Mr. **Lott**. What would you do with a Member who violated that provision?

Mr. **Beilenson**. I guess if it is contrary to our rules, the Ethics Committee would have some means of enforcing it.

Mr. **Lott**. Also I would think a lot of Members get maybe 2,000 PAC contributions from various groups and individuals in a campaign year, and might not know that they got a contribution that is related to this particular area.

Mr. **Beilenson**. Might not know?

Mr. **Lott**. Yes.

Mr. **Beilenson**. They will have to check, I guess. It seems you are going beyond voting on measures and you are asking somebody to carry water for a special interest that has been helpful to you. I find it obnoxious and offensive. If someone gave me a $5,000 contribution and said, "We are not asking you to vote for legislation, we are asking you to sign a petition which unfairly affects us," I think it will put the Congress into disrepute unnecessarily. That is all.

Mr. **Moakley**. I can see the problem. Members probably would not be able to take any contributions for fear a veto will come up and they will be asked to vote for it.

Mr. **Beilenson**. On something you have to vote for, you have to vote, but you do not have to do their dirty work in terms of signing a discharge petition to try to bring a matter before the Congress, because the affected industry does not like the rulemaking process or the results. I think that is going a step beyond what we have to do. If it makes people more careful about accepting PAC contributions, that is acceptable. That might be better in the long term.

Mr. **Moakley**. I can see what the gentleman is referring to. It does take the "Caesar's wife" approach away.

Mr. **Beilenson**. We have Members on the floor who have to go to bat for a particular interest with which they are particularly alined. This will extend it. It is natural for someone who has given you $5,000, when you are concerned about your election, to ask only in return that next year you please sign the discharge petition so Congress can take a look at this thing which they think has an unfair impact on them. Of course you sign it. They were helpful to you, and they need your help. I do not like putting Members of Congress in that position.

Mr. **Moakley**. The gentleman raises a good point.

Mr. **Frost**. I have no questions, since I missed the bulk of his testimony. I am interested in the subject and sympathetic to the gentleman's position.

Mr. **Moakley**. I am glad that you are willing to change like that. If some other people were willing to change, maybe we could get something through.

Mr. **Lott**. I am not committed to saying this is the avenue, go, but I urge this committee to address this area. We need to do it. Like some other areas where we need institutional reform or we need to have this opportunity, I think this subcommittee—I do not think we reported any legislation this year—this is an area where clearly I hope the subcommittee will take some action.

Mr. **Moakley**. We have about 3 minutes to vote on the final passage of the bus deregulation legislation. I understand that you have got the next rule up, too.

Mr. **Lott**. Thank you very much for your time.

Mr. **Moakley**. Maybe we can talk again. The subcommittee will be recessed for 5 minutes.

[A brief recess was taken.]

Mr. **Moakley**. The subcommittee will come to order.

The next witness to testify before us is the Honorable George Hansen of Idaho, sponsor of H.R. 314. We are very happy to hear from you.

STATEMENT OF HON. GEORGE HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. **Hansen**. Thank you, Mr. Chairman.

I appreciate the possibility to be here today.

Mr. Chairman, Federal regulations have gotten completely out of hand. Congress makes the laws, but bureaucrats are writing rules by the thousands that amount to laws—and they are doing it with our blessings, but with precious little congressional supervision, leaving a frustrated public to be preyed upon in a bureaucratic jungle where the price of survival for a citizen can be frighteningly high, if not impossible.

The cost to the Nation of Federal regulations are staggering—with estimates ranging up to $100 billion by the end of the current fiscal year. That breaks down to about $2,000 a year for each family of four.

I cannot believe the Congress, as elected Representatives of the people, ever intended to impose such a burden on those they serve.

But let me be even more specific as one who has dedicated my several years in Congress to fighting regulatory excesses which are progressively becoming more frightening, more frustrating, and more insidious.

My own congressional district cannot be much different than the other 434 and I find the dual terrors of overregulation and overenforcement of regulations by unelected bureaucrats to be a nightmare for the public.

The posture of the laws and their enforcement has drifted from the hands of Congress and with it Government is becoming the adversary, rather than the servant, of the people—even to the point of legal and financial assault. For example:

First, I had to raise $160,000 in a nationwide effort to help an average small businessman go to the Supreme Court to prove congressional intent on OSHA inspections—OSHA wanted him in jail to prove their authority and as a deterrent to others against such challenges.

Second, Idaho's other Congressman and I are in the process of helping raise legal funds of $40,000 to help 10 farmers pay to defend themselves against an entrapment operation by the U.S. Immigration Service.

Although the farmers were exonerated of these felony charges and the Federal court condemned such INS actions, that Agency immediately announced that it was doing the same thing in other areas and planned to continue these operations.

Third, as Congressman for the victims of the Teton Dam disaster, I have spent years fighting attempts by the IRS to turn relief funds into capital gains taxes.

It was this process which fully acquainted me with the ruthlessness of the IRS and the fact that they would resort to any tactic, no matter how illegal, to have their way, such as—You may have seen the "60 Minutes" slot.

Mr. MOAKLEY. I was just going to ask if you saw it.

Mr. HANSEN. This is the way they have their way: (a) hate lists, (b) spy files, (c) electronic surveillance of taxpayers, (d) wholesale unauthorized searches and seizures, (e) vindictive harassment for purpose of bankrupting small businesses and individuals, and (f) criminal use of tax return information to prejudice jury selection in prosecutions and general illegal disseminations of taxpayer information. The irony of this situation is that right now, despite this tawdry record of misuse of authority, the IRS is currently asking a joint committee of the Congress for permission to reveal legally what they have until now has been leaking illegally, the privileged return information of taxpayers.

My point is, Mr. Chairman, if the Congress is going to pass the laws, we had better see to it that they are fleshed-out and carried out by the agencies with proper congressional intent.

We are the elected officials directly accountable to the people—not the bureaucrats, and not the courts.

It is our duty to look at the final product of the laws we pass—we owe that much to the people we serve. And that is the spirit of the legislative veto. The legislative veto provides the fence at the top of the cliff. It sure makes a lot more sense than stationing an ambulance at the bottom to pick up the victims of neglect.

The legislative veto will enable the Congress to carry out our duty to the people we serve with a minimum of time and a minimum of cost—particularly when compared to the scandalous expense to the public of Federal regulation.

Now, Mr. Chairman, the issue of the so-called legislative veto has spawned some objectives which simply do not square with the facts. There are those who warn us that the veto would be an improper intrusion into the powers of the Executive. It would be, so such critics say, a violation of the doctrine of separation of powers. Some critics have even claimed that such a legislative restraint on the regulatory agencies would be unconstitutional.

Isn't it interesting how we sometimes tend to forget the obvious—the fact that it is the Congress which created these agencies and vested in them the power to make regulations with the force of law. And now these very agencies raise the bogus constitutional limitation issue on Congress to monitor its own creations.

We cannot afford to ignore any longer the plain fact that too many of these agencies on too many occasions engage in making substantive positive law. The real issue is not whether we can limit the activities of these delegate lawmakers, but whether we can continue to ignore their legislative excesses done in the name of Congress.

The existence of commissions to review the regulatory functions of agencies or of congressional oversight of the consequences of the uncontrolled power of the regulatory agencies should not deter us from the effort to achieve regulatory veto, and I urge you to reject such suggestions.

The Government has become a huge enterprise. We now undoubtedly need the agencies which have been developed over the years to operate it. We should nonetheless remain aware that the agency system is a tradeoff. It is a step away from a rule of law by legislative action and toward law by the personal judgment of a bureaucrat. And while it may be a necessary device, it is also a dangerous one since it often determines issues which concern the survival of individuals, businesses, and institutions.

The surge of interest in reforming the agencies cannot be trusted to maintain the kind of enduring surveillance over these agencies which recent history tells us is essential to preserving the proper functions of both the Congress and the bureaucracy. Administrations come and go. Commissions expire. Even committees for special purposes fade away. But unchecked power goes on accumulating as, with respect to most of these agencies, it has been for the better part of 50 years. Legislative vetoes, properly incorporated, will endure and protect the integrity of our legislative system for as long as there is a Congress.

The sheer number and gravity of the complaints by individuals and businesses against oppressive bureaucratic rulemaking should by itself serve as a warning that the problem is not merely one of an internal struggle for power between executive and legislative divisions or between competing political parties and philosophies.

This committee may remember that 2 years ago, a problem developed over the drafting and implementation by the IRS of a complicated and repressive rule on the tax exemption of sectarian private schools. The effect, if not the intent, of the rule would have been to put hundreds of small private schools out of business for failure to satisfy the IRS that they were not segregated. Several Congressmen, among whom I was one, protested to the IRS that the compliance tests were so onerous that to prove that they qualified, would bankrupt many of the schools.

In addition, the rule change was denominated as a procedural matter. Since only substantive rule changes mandate hearings, the IRS was apparently attempting to avoid accepting input from anyone on this highly emotional issue. By this evasive device the rule was adopted, but only to be suspended, once by amendment attached to an appropriations bill and once by an agreement on a continuing resolution. That matter deserves our attention here in the context of legislative veto for three reasons.

First, in the face of clear legislative objection to the rule by literally hundreds of Members of both Houses, the IRS announced its continuing intention to enforce the rule once free of the temporary financial restraints adopted.

Second, IRS pursued aggressively in court an attempt to subvert legislative reconsideration of this bureaucrat rule.

Third, during the controversy, the then Commissioner of Internal Revenue based his persistent attempts to enforce the rule, not on his statutory mandate from Congress, but upon his self-proclaimed duty to enforce the public policy of the Nation.

No one has been able to explain to me how the Commissioner of Internal Revenue is authorized to dictate public policy through the tax collection process. Even more so, I am sure no one here can be comfortable with the idea of a tax commissioner creating public policy for the United States even when at apparent odds with the constitutional guarantee of free exercise of religion.

Public policy is the sum of the legislative work of Congress, not the product of a bureaucrat ego trip.

This is on the forum to discuss racial problems or freedom of religion, but that single case is a telling example of the almost uncontrolled quality of arbitrary rulemaking. The Commissioner of Internal Revenue dives into two of the more sensitive areas in our society without the slightest indication that he either understands or cares about the social havoc his legislative usurpation could cause.

Granted that one example does not make a case. Nonetheless, it does show that, without immediate, effective congressional supervision, the rulemaking function can run wild. And I doubt that there is a Congressman in this room who has not had personal experience with the damaging effect of ill-considered agency regulations and the amount of effort required to undo them. Certainly it is not necessary to emphasize further how the legislative veto could save much time, energy and anxiety by "keeping the horse in the barn" instead of trying to round him up after leaving the stable door open as we now do.

Now there are many variances of bureaucrat abuse of the rulemaking power. In some instances, the divergence between legislative authority and the actual implementation appears only by imperceptible degrees. So the Internal Revenue Service has, over time, been able to arrogate to itself the power to determine the tax due from an individual, assess the amount, seize property, sell the property, bankrupt the individual, all without the opportunity for the individual ever to see the inside of a courtroom or receive even a rudimentary form of due process. It is difficult to point to any one rule change or any specific time when the taxpayer as such was excluded from the operation of the protection of the Bill of Rights.

But it is plain as day that he no longer has rights vis-a-vis the IRS—rights which we have always understood were to protect all citizens, including taxpayers, against abusive acts of Government. The legislative veto will not cure all of this overnight. But it will, beyond question, provide the electorate with a focal point for legitimate complaints. And hope for needed and timely relief in an orderly, well-constructed legislative veto process is certainly preferable to trying to impose hit-and-miss legislative restraint, through hastily conceived amendments added at the last minute to appropriations acts on the floor of the House. And I am sure we have all gone through that agony.

In the interest of constituents and of the Nation at large, Members will use any vehicle available to them. Commonsense dictates that we provide a less dangerous and cumbersome means than tampering with the fiscal process of the Nation. As some of the members of this committee may be aware, I have devoted a great deal of time and effort to limit the damage done by the Occupational Safety and Health Administration. Enlarging upon my earlier reference to OSHA, I propose to cite just a few of the worst examples of regulative abuse by that Agency. In doing so I remind you that the OSHA Act of 1970 is printed in the United States Code in just 34 pages while as of this moment, there are more than 10,000 regulations covering 800 pages in the Code of Federal Regulations—this even after a recent cancellation of approximately a thousand existing regulations.

OSHA for years was a regulatory embarrassment which could have been prevented by timely congressional review. Even now its image of overregulation and overenforcement remains. Many of the regulations are simply unintelligible. Others are incredible. All are an economic burden, some of such proportions as to defy belief. In the period of only 10 years OSHA compliance costs are in the $20 billion range.

The list of regulations produced by OSHA which violate prudence, commonsense, economic realism or the civil rights of the business community is too long to produce here. A few of the worst will serve to illustrate my point.

OSHA proposed to require farmers to provide lavatory facilities no more than 5 minutes walk from the place of work. Congress, which always has a few farmers among its number, could never do something so foolish. Trivial as it is, it illustrated the mind set of the OSHA bureaucrat, and the "traveling outhouse" became the prize joke about bureaucrat incompetence.

I know at least one Senator that got here just dragging one of those around the premises of one Western State.

In another case, OSHA tried to require a western university to replace 6,000 fire extinguishers, because they were the wrong color.

Companies have been ordered to remove guardrails 41 or 43 inches high and replace them with rails exactly 42 inches high.

One firm provided more fire extinguishers than required and hung them carefully at the required height and was still slapped with a fine for setting an extra unit on the floor.

Regulations required a shorter turning radius for some forklifts; but when their wheel bases were shortened to comply, the vehicles were rendered dangerously unstable.

Some of these regulations are no longer on the books, but that they were there at all is the essence of the problem.

However, the worst aspect of unchecked regulation is that the victim of improper rulemaking is relegated to the courts for relief at his own expense and inconvenience. Several years ago, as I mentioned in the beginning, a constituent of mine named Barlow got into conflict with OSHA over whether their inspectors had the right to enter his business premises without a court order—the question being whether the act removed an employer's fourth amendment rights against unreasonable search. After years of litigation and hundreds of thousands of dollars in legal fees to finance Barlow's and dozens of similar cases across the Nation, the Supreme Court finally found that the Agency was wrong and Congress had indeed not intended to authorize unconstitutional warrantless searches. Surely legislation which allows recourse to Congress to determine what it intends is preferable to putting the small businessman to such strain and expense.

ENFORCEMENT

The necessary corollary of rulemaking is enforcement. It is in the agency's enforcement of its regulations that the potential for the abuse of power is most evident.

I have mentioned the Barlow incident. It is but the most prominent of many court cases where small businessmen have been forced to defend their rights in court at their own expense.

Not as attention getting, but just as important to the people involved are cases like the one in which a businessman put two identical machines in his plants, located in different States. In one of them, the Federal OSHA inspector certified the machine's safety. In the other, the inspector fined the man because he was operating an unsafe machine.

Another man was driven out of business by OSHA for failure to repair a machine because of the unavailability of spare parts locally, then fined after he was out of business as an example to others in similar situations.

But OSHA is not alone. I earlier noted another case where during this session of Congress, the Immigration and Naturalization Service procured the indictment of 10 farmers in my district for "aiding and abetting the transportation of illegal aliens." At trial the Federal judge threw out the case and reprimanded the INS because it had in fact gone into Mexico and brought the aliens across the border illegally, transported these fugitives a thousand miles to Idaho illegally, and delivered them to the farmers who were then amazingly charged with trafficking.

It would take an entire separate hearing, which will, I hope, soon occur to detail the collection excesses of the Internal Revenue Service which I earlier pointed out. During the past year alone, with only my staff and without committee resources, I have been able to uncover misconduct in the following areas:

No. 1. Illegal and perhaps felonious use of IRS returns and taxpayer records to assist U.S. attorneys in jury selection in criminal cases.

No. 2. Seizure and sale of homes for punitive and not collection purposes, and that should shock any person in this Congress.

Mr. **Moakley**. How would that work?

Mr. **Hansen**. What happened is the IRS returned information to the U.S. attorney in this particular State when he was in the process of jury selection, so apparently it gave him some kind of an edge in deciding who would serve on the jury in a criminal tax case.

The defense attorney got wind of the thing and asked for equal access to this type of information and was told it was illegal for that information to be given to him under such and such a code.

In checking the code, it was just as illegal for the U.S. attorney to have it. Those are confidential and this gets into the area of jury rigging. This is all provable by court records.

No. 3. Maintenance of lists of people in violation of the Privacy Act for purposes of coercion. Again the idea that they weren't getting money, all they were doing was punishing. The money was not applied to the debt.

No. 4. Illegal electronic surveillance of potential tax violators.

This has been turned over to the Justice Department. It is in the Criminal Division now for investigation.

CONCLUSION

The evidence is beyond dispute that the system of legislating which has developed over the past 50 years of passing laws which are only general outlines to be filled in with regulations by a delegate agency has serious pitfalls.

Whether it be the IRS, OSHA, the Federal Trade Commission, EPA, or any other agency, substantive regulations are taking the place of legislation. It is only to be expected that some of that regulation will exceed the intent of Congress and some will even be directly opposed to that intent.

We as Members of the Congress cannot give up our legislative responsibility. We must maintain control over what we set in motion.

At this point, the regulatory agencies are a high-powered machine without an effective emergency brake. The Congress, responsive to the public mood at the polls, must either provide that brake or continue to bear the responsibility for the increasingly heavy damage being done by uncontrolled regulatory lawmaking.

The legislative veto is a modest step to retain the advantages of the agency system while enabling us to maintain the rule of law which is the pride of our governmental system. I strongly urge the earliest possible adoption of the regulatory veto.

Mr. MOAKLEY. George, one thing that strikes me in your bill that differs from the others is that the legislative veto provisions would not apply to existing rules.

Was that done purposefully?

Mr. HANSEN. I think in the oversight process of the Congress, I think we can better deal with anything that is passé, but I think that anything that is in the process of being formulated such as the hearing or the protest time in the Federal Register or anything else, I think that is the escape valve.

In other words, we take care of where we are today and in the future and we will have to, through the oversight process, go back and clean up the old problems.

Mr. MOAKLEY. Yours is the only one I am aware of that is strictly a one-House veto as opposed to the Levitas bill, which is——

Mr. HANSEN. I feel that the Congress is probably involved enough with the needs and the feelings of the people that one

House would be overridden by a total act of Congress anyway, but I think that you would have an unworkable situation trying to have more than one House exercise such a veto.

Mr. MOAKLEY. Your bill applies to all rules, even minor changes. We have some legislative veto bills that just apply to major rules over so many millions of dollars. Your bill would apply to any rule, whether major, significant or minor in nature?

Mr. HANSEN. Let me point out, Mr. Chairman, that this private school problem that I mentioned in here is an example where the agency tucked that proposed regulation back in a very unorthodox section which was almost lost.

I think we get into that kind of a problem. I believe that the Congress, just as where we have committee review of certain legislative or departmental acts now, I think that we probably could devise some means under that concept to be sure that we didn't let the big fish get away by inadvertence and had a way to move the smaller things through with some dispatch.

Mr. MOAKLEY. When you are talking about the bureaucrats running wild with legislative intent, do you think that some of that problem might be ours, resulting from the way that we draft our legislation?

Sometimes we have to draft a bill in somewhat ambiguous language in order to get it through committee and get it to the floor. So, therefore, if members of the committee aren't sure what phrases mean, how will someone who wasn't privy to the report when the bill goes through know what we are talking about?

Mr. HANSEN. I share the chairman's concern. Not only do we have that kind of problem where there is ambiguity on what is intended on legislation, we know when we get to the close of a session and legislation is pumped through en masse that a lot of things go through that none of us know what is involved and we end up in a David Stockman exercise later trying to find out where we were.

I think we need a chance to re-review before the damage is done. If we don't know, how would the bureaucrats know? I am not intending an assault on bureaucrats. I think it is a relief to those people to give them a hand where it is not clear and they are not operating in the gray.

Mr. MOAKLEY. Mr. Beilenson?

Mr. BEILENSON. That was nicely put. No questions.

Mr. FROST. No questions.

Mr. MOAKLEY. Thank you very much for your statement.

The subcommittee will now hear from the National Association of Manufacturers, Mr. Richard Patterson, manager, Government Affairs, Dow Chemical. Mr. Patterson will be accompanied by Mr. Robert Ragland.

STATEMENT OF RICHARD M. PATTERSON, GOVERNMENT RELATIONS MANAGER, DOW CHEMICAL

Mr. PATTERSON. Good afternoon, Mr. Chairman and members of the subcommittee.

I am Richard Patterson, Government relations manager, Dow Chemical.

Today I am appearing here on behalf and in conjunction with NAM. As you pointed out, accompanying me is Robert A. Ragland, director of NAM's Regulatory Reform and Government Organization Committee.

We have submitted a written statement which I request be included in the record.

Mr. **Moakley**. Without objection, your entire statement will be included in the record. [See p. 376.]

Mr. **Patterson**. The NAM appreciates this opportunity to testify on this pending legislation which seeks to establish congressional oversight mechanisms.

NAM has a continuing and active interest in the establishment of meaningful regulatory reform mechanisms. As you know, there is broad agreement on the necessity for regulatory reform and reducing the compliance costs to, and the Federal involvement in, private industry.

To accomplish this reduction in Federal cost and involvement, NAM is urging the Congress to pass a three-part regulatory reform program. Part I would be amending the Administrative Procedures Act to mandate some good business practices on the regulatory agencies.

Part II deals with the adoption of a series of proposals which would insure effective oversight of the so-called fourth branch of Government, that is, the bureaucracy, and that specifically is what you are looking at.

Part III calls for the review and revision of the underlying statutes to make them more cost effective.

Right now the House Judiciary Committee is in markup on H.R. 746, the Regulatory Procedures Act of 1981, amending the APA, that is, this is part I of the three-part program that we would like to see Congress enact.

In its current form, H.R. 746 contains an ineffective legislative veto proposal and contains no sunset provision at all.

NAM believes that both legislative veto and sunset are necessary to give Congress the tools, and the mandate, to oversee the regulatory process and to make sure that the regulatory agencies are on track.

We wish that the ineffective legislative veto proposal was not part of H.R. 746; we would much prefer that Congress act on legislative veto based on its own merits—not as one of the provisions of a multifaceted bill.

In order to be effective, any congressionally enacted sunset provision requires two basic ingredients. The first is developing a system wherein all Federal regulatory programs are reviewed on a systematic and periodic basis.

The second is an action-forcing mechanism which compels Congress to perform the oversight required by law and to make recommendations regarding those regulatory programs.

Automatic termination—sunset—accomplishes precisely that. NAM would oppose any proposal that did not include both ingredients, that is, a system and an action-forcing mechanism.

Whereas sunset requires the periodic reevaluation of Federal regulatory programs, it would do so only every 10 years or so and would be program-specific rather than regulation-specific.

There is a mechanism which provides both a more timely and a more targeted response to Federal regulatory actions and that is legislative veto.

You have heard a lot of comments today on legislative veto, but the NAM has testified in the House in support of H.R. 1776 and on similar proposals now pending before the Senate that would give Congress the authority, without Presidential involvement, to veto a proposed Federal regulatory action.

Admittedly, the constitutionality of legislative veto is far from clear. NAM believes, however, that Congress could craft a legislative veto provision that would withstand judicial scrutiny.

There is much precedent for such legislation; presently there are in excess of 200 Federal laws which incorporate some form of legislative veto.

Legislative veto is a mechanism which could prevent noncost-effective regulations from going into effect, rather than going through the lengthy process of judicially reviewing the regulation and then having it deemed to be invalid, that is, Congress could stop the damage before it was done.

It is pretty hard to recover costs, such as extensive animal testing, if the courts deem a regulation invalid after the tests have been completed.

Together, meaningful sunset and legislative veto could provide Congress with the tools to insure that Federal programs, rules and regulations, both short term and long term are consistent with both congressional intent and with changing national priorities.

We urge the committee to forge ahead with the development of meaningful sunset and legislative veto legislation and to oppose provisions which promote uncertainty through the sunsetting of the provisions of the tax code—the so-called tax expenditures.

As I mentioned earlier, with me today is Robert A. Ragland who, as director of NAM's Regulatory Reform and Government Organization Committee, is prepared with an overview of the problems and uncertainties of proposing the sunsetting of the provisions of the tax code.

Mr. **MOAKLEY.** Mr. Ragland?

STATEMENT OF ROBERT A. RAGLAND, DIRECTOR, REGULATORY REFORM AND GOVERNMENT ORGANIZATION COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. **RAGLAND.** Thank you, Mr. Chairman.

Mr. Chairman, I would like to note a mistake in the prepared text. At page 4, the seventh line from the top, the sentence, "Chadha will not control, and is dispositive," should read "is not dispositive," the correction being "not." [See p. 380.]

A corrected version has been supplied to the clerk for the record.

The NAM opposes the application of a "sunset" provision to the so-called tax expenditure concept. Our rationale is set out in our prepared text which has been submitted for the record. This fact, in conjunction with the delegation of jurisdiction on this issue by this subcommittee to Mr. Long's subcommittee vitiates the need for oral testimony at this time. I understand that this subcommittee, by its chairman, has asked Congressman Long to include the NAM statement on the sunsetting of tax expenditures in his subcommittee's record. Therefore, the NAM is prepared to respond to your questions. Thank you.

Mr. **Beilenson**. Excuse me. May I ask a question?

Mr. **Moakley**. Yes.

Mr. **Beilenson**. Am I correct in understanding that the subject matter the gentleman is presently speaking about is not before the subcommittee?

Mr. **Moakley**. We have another subcommittee chaired by Congressman Long that deals specifically with sunset legislation.

I have taken the liberty to submit your statement in full to his committee.

Mr. **Beilenson**. I thought that we, ourselves, don't have jurisdiction——

Mr. **Moakley**. We don't have jurisdiction, but we will take the testimony and we will relay it to Congressman Long's subcommittee.

Mr. **Ragland**. I see no sense in going on. I was under the understanding that this was under consideration in the committee.

If the statement is in the record, there is no reason to continue.

Mr. **Moakley**. The Subcommittee on the Legislative Process is deliberating on sunset legislation, which is Congressman Long's subcommittee. So, therefore, I have taken your statement and given it to his subcommittee.

Mr. **Beilenson**. It was better when we had numbers for the subcommittees.

Mr. **Moakley**. So the gentleman can cease his testimony, if he would like.

Mr. **Ragland**. I would be happy to.

Mr. **Beilenson**. Then I won't ask you the challenging questions I was about to ask.

Mr. **Moakley**. We will include his entire statement in our record also.

Opponents of the legislative veto feel that it would put just another layer of bureaucracy on the present one and that we will be substituting the bureaucrats down there, wherever "there" is, for the bureaucrats up here. The legislative veto will only increase the work of the Congressman who will have to look at every rule and regulation that comes out in the Federal Register.

Mr. **Patterson**. We would prefer to have Congress, somebody accountable to the voters saying whether or not the regulators are following the intent of Congress, the national policies and things of this nature.

This is why we call them essentially the fourth branch of Government over here, and as such they haven't had much in the way of oversight and much in the way of control, and the idea of using, as you have pointed out, the courts to control them, that is an awfully long fuse, and as many people have pointed out, the damage is done by that time.

You can't return a used scrubber if you no longer need it.

Mr. **Moakley**. You said you favored H.R. 1776?

Mr. **Patterson**. Yes.

Mr. **Moakley**. So you favor the major and minor rules being subject to legislative vetoes?

Mr. **Patterson**. Yes, sir. In talking to Members of Congress about legislative veto, the objection to the number of rules coming through and the load that it would put on the congressional staff, I could well understand that concern, and thought originally that the exclusion, limiting legislative veto review only to major rules, was the way to go.

I am basically a cynic, and I could see a regulator taking a rule, purposely not designate it as major, and say, no, that is not a major rule, ergo, it would not be subject to legislative veto, and he can continue on with his past ways.

Therefore, we would like to see all regulations come through Congress so the Congress at least has the opportunity to take a rule that should be a major rule, that is a signficant impact on the economy, even though it is not designated as such, and have the right to go through the legislative veto procedure with it.

Mr. **Moakley**. Do you have any feeling that the agencies would then go to the adjudicative process rather than the rulemaking process to circumvent the legislative veto?

Mr. **Patterson**. I don't know whether they can legally go the 556 route vis-a-vis the section 553, the formal hearing route, whether they could do that.

If you like, we can have our people take a look at it and see if legally they feel they can do that.

Mr. **Moakley**. If it wouldn't be too much of a problem, I would like to have that for the record also.

Mr. **Patterson**. Be happy to.

Mr. **Moakley**. Mr. Beilenson?

Mr. **Beilenson**. I don't mean this unkindly, but we already know the general arguments for and against. We have heard them before. I was hopeful that people testifying on behalf of the business community would be able to come to us with specific examples, as Mr. Hansen did, examples that he had come upon in his service as a legislator, specific examples of executive rulemaking authority as it affects large businesses and Dow Chemical, perhaps, which you work with, although you are representing a wider spectrum of the people.

Rather than just talking in generalities, we need to know what the specific problems are so we can know if in fact somebody can really build a case for the necessity for legislation, and so we can draft legislation that is as careful and precisely attuned to the specific problems as possible.

Mr. **Patterson**. We, hoping to be rather brief, did not get into all those details. I will give you examples. There was an illustration in the Wall Street Journal this week about the Dow Chemical Co. and it dealt with the polychlorinated biphenyl.

EPA had designated a monochlorinated biphenyl. They had taken a polychlorinator. We make a similar chlorinator, which our chemists say are an entirely different group of things.

The agencies rewrote the dictionary to make poly and mono synonymous. That is the type of thing we would like to get away from, specifically.

Mr. **Moakley**. What effect did that have?

Mr. **Patterson**. Killed a whole product line.

Mr. **Moakley**. How much money was invested?

Mr. Patterson. I don't know. It has been in our product line for years. It is probably in the Wall Street Journal article, what capital was involved.

Mr. Moakley. Did they say they were synonymous or did they just change the rule to include mono as well as poly?

Mr. Patterson. The legislation says polychlorinated biphenyls. The EPA interpreted that law to make poly and mono synonymous.

Mr. Beilenson. There is no place to appeal that rule?

Mr. Patterson. There probably is, but the cost and time lapse, you can appreciate the problem.

Mr. Moakley. Was this before the product hit the market or afterward?

Mr. Patterson. After. The polychlorinated biphenyls, they have been produced for a long time. We have been producing this product for a long time, and it was due to this basic problem with changing of Webster's dictionary.

Mr. Moakley. Did you come out with this mono product after the poly had been on the market?

Mr. Patterson. This I don't know. Both of these preceded the legislation by many years.

Mr. Moakley. I was wondering if you went to the mono so that you would be in agreement with the regulation and then found that the mono was illegal also?

Mr. Patterson. No; these are two different things. They go into different end users. The poly go into the electrical fields, transformers and things of that nature.

Mr. Moakley. Not being a chemist——

Mr. Patterson. I am not either.

Mr. Beilenson. I think you testified, and also Mr. Lott did, as part of the argument for a general law, something like 200 legislative vetoes of one form or another?

Mr. Patterson. It is a large number.

Mr. Moakley. I think 250.

Mr. Beilenson. Hasn't Congress applied that to the EPA?

Mr. Patterson. It is authorized in superfund legislation, it was specifically cranked into the superfund.

Mr. Beilenson. It seems Mr. Levitas and some of his colleagues have been on the floor pushing these amendments at the end of each bill, and the amendments are always being accepted by the manager of the bill, so it is surprising that EPA wasn't one of those included.

Mr. Moakley. They might have been absent that day.

Mr. Dooling. Specifically in insecticides, toxic wastes and superfund. The committee has not gone to the floor with a lot of EPA bills. There is no generic authorization for the whole agency.

Mr. Beilenson. This is not in response to Mr. Patterson—we probably have vetoes from two-thirds of the people asking for them now.

As Mr. Lott said, apparently they have been used 14 times in 9 years, so there is a question as to whether or not we need general legislation, because it is used so infrequently.

Somebody ought to prepare a list of places where the veto already exists and where it doesn't yet exist, so we know exactly what any generic bill would cover not presently being covered.

Mr. MOAKLEY. Counsel tells me we have a list of legislative vetoes and what they affect.

Mr. BEILENSON. They must affect a lot of things.

Mr. DOOLING. It requires a person fulltime in the Library of Congress just to compile the list.

Mr. BEILENSON. Aren't there a lot of other regulatory agencies whose rulemaking is not covered?

Mr. PATTERSON. OSHA.

Mr. BEILENSON. I don't believe that OSHA isn't covered by legislative vetoes. That is all anybody talks about.

Mr. PATTERSON. That is why I refer to that specifically, especially with Mr. Hansen sitting here.

Mr. BEILENSON. You would think he would complain to us.

Mr. MOAKLEY. Maybe he had nothing to complain about.

Mr. FROST. The vetoes have been attached to authorization bills and it may be that we didn't have the opportunity on the OSHA authorization bill when it came in. That is the vehicle for most of them, as I recollect.

Mr. Chairman, I do have one question.

Mr. MOAKLEY. Mr. Frost?

Mr. FROST. I believe you spoke to this, but I would like to ask again.

In terms of the scope of the veto in terms of whether it should be limited, as some have suggested, to those instances whether the regulation is contrary to law or inconsistent with legislative intent, if I understand, you do not feel it should be so limited, that there should be other opportunities?

Mr. PATTERSON. Correct.

Mr. FROST. Could you elaborate on why you feel it should not be limited?

Mr. PATTERSON. That I am going to have to get back to you on with a specific response, Mr. Frost. The concept of limiting this to either it doesn't fit the congressional mandates or inconsistent with the letter and intent of the law is a little different, and it is something that our committee has not looked at specifically.

If you wouldn't mind, I would like to get back to you with a written response on that.

Mr. RAGLAND. I think that there is an example that may be easily available that when you deal with the saccharin issue, clearly that was a situation where it was within the intent of Congress that that particular product was not to be on the market, and it took a specific legislative act to change that intent.

If it was limited just to the areas you had suggested earlier, we would still have to go through the legislative process in order to come up with the same result, which Congress has done now two times.

Mr. FROST. We did have field hearings in Dallas that I presided over 2 years ago, and it seems that many of the complaints dealt with issues other than going beyond legislative intent and other than being inconsistent with law, but dealt with the cost of compliance and with the duplicative nature of regulations from agency to agency, and that was really what I was getting at as to whether you feel that those are primary things that we should be concerned about, that those are important things that we should be concerned about, because we had—basically the people who testified were small- and medium-sized businesses.

We did have some large industry, but it was primarily smaller type business, and those were things that they were very concerned about.

Mr. PATTERSON. Mr. Frost, big business, like many of the NAM members, are just as concerned with that. We have seen the regulatory agencies go through all these prescriptive standards and things of this nature which are extremely costly, maybe not cost effective, duplicative.

We are hoping that the legislation that is going through the Judiciary Committee right now, H.R. 746, will solve a lot of those problems. Probably it will not, if it became law, solve all those problems. Veto under these circumstances to take care of the duplicative, the excessively costly and others would be a good area to have.

Mr. FROST. The real issue is how do you exclude out those instances when Congress just doesn't happen to like a particular regulation or when what we are doing is getting a second bite at the apple, when we are in fact, through the vehicle of legislative veto, going back and undoing law simply because we have changed our mind rather than attacking the regulation for a valid reason such as the ones we have discussed.

If there is a clear mandate on the agency to do specific things, you may want to make sure that they are doing those specific things in the right way or in the most cost effective way where in many cases the agencies are given broad latitude.

It is a matter of checking agency policy that they are headed in the right direction and doing what Congress intended them to do. The alleged veto being considered for the Federal Trade Commission on the used car rule—I think Congress is going to tell the Federal Trade Commission, that isn't what we meant.

You are off in the wrong direction or you are picking nits or something of that nature. Get out of there. I think this is one of the very broad advantages that alleged veto has, is to indicate to the agencies what your true intentions are.

This is really the last commentative. I basically support the concept of legislative veto in terms of adding it to various authorizing bills, including the FTC bill.

My concern is that the opponents of legislative veto of an easier job in attacking the proposition when there are no limits on the scope of legislative veto. If in fact we are to pass one, pass legislation that would apply across the board to all agencies, that we will have to have some limits on the scope of legislative veto in order to pass a bill.

And the question is what those limits are, and to propose, as some of the bills before us do, propose one without any limits, without any standards I believe jeopardize the chances for enactment of legislative veto.

Mr. PATTERSON. I think that is a political decision rather than something in our shopping list that the Members of Congress are going to have to determine: What are the limits that Congress as a whole will accept?

From the outside looking in we see Mr. Levitas with 232 cosponsors on H.R. 1776, that is better than half of Congress. It kind of looks like a majority of the Members of Congress are supportive of a 1½-House veto with no limits.

I think we will have to wait and see.

Mr. **Frost**. It would not be the first time a piece of legislation has been sponsored by more than 218 Members and not been enacted.

Mr. **Patterson**. Right.

Mr. **Moakley**. Some people, Mr. Patterson, feel that Congress deliberately passes very broad legislation in specific areas and then lets the regulatory agencies make the tough choices in building the regulations around them.

What is your feeling, on that?

Mr. **Patterson**. My feeling from the outside looking in, it appears to be that way, Mr. Moakley. For one reason or another Members of Congress decided this is the way they want to handle things. Maybe they don't have the time, maybe they don't have the expertise. There may be political considerations involved with it.

In many cases the agencies are given very broad latitude, either by intent or accident. But it is there.

How do you control them? How do you get them back under control? We think legislative veto, the omnibus regulatory reform legislation are a couple of the ways they can be brought back into control that they are accountable to somebody, namely Congress.

Mr. **Moakley**. You propose excepting tax expenditures from sunset. What about the legislative veto applying to the IRS rules themselves?

Mr. **Patterson**. I believe most of the legislation has specifically excepted IRS and that is our feeling, too. That is an entirely different ball game.

There are many other considerations involved with it. The House Ways and Means Committee does an awful lot of oversight of the IRS. And I think they can pretty well keep them under control.

Mr. **Frost**. If the gentleman would yield, of course that was one of the points Mr. Hansen made. He was concerned about an IRS regulation. In fact, I have supported him and others on the floor on that point, the one dealing with the private schools was in fact an IRS regulation.

Mr. **Moakley**. Yes.

Mr. **Frost**. It did require a particular piece of legislation for us to be able to override that. I would think that we should not as a general proposition exclude all the IRS regulations. Perhaps we would want to have some standards in terms of which ones we would look at. I don't know. But all sorts of things are tucked away in tax codes as Mr. Hansen indicated.

Mr. **Moakley**. Fine.

Mr. Patterson, thank you very much. Mr. Ragland, thank you very much for coming.

Mr. **Patterson**. Thank you for the opportunity.

[The prepared statement of the National Association of Manufacturers follows:]

NAM

COMMENTS OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE
HOUSE COMMITTEE ON RULES
SUBCOMMITTEE ON RULES OF THE HOUSE
CONGRESSIONAL OVERSIGHT PROPOSALS

NOVEMBER 19, 1981

Presented by:

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The National Association of Manufacturers is a voluntary organization of industrial and business firms both large and small, located in every state. The NAM's 12,000 member companies and 158,000 affiliates, through the National Industrial Council and Associations Department, represent nearly 80% of our national industrial output and 85% of industrial employment. Together, we support principles which encourage individual freedom through sound programs designed to enhance the economic well-being and social progress of the American people.

Mr. Chairman, Congressmen, good morning. My name is Richard M. Patterson, and I am Government Relations Manager for Dow Chemical, U.S.A. I am appearing today on behalf of the National Association of Manufacturers (NAM). Accompanying me this morning is Robert A. Ragland, Director of NAM's Regulatory Reform and Government Organization Committee. The NAM appreciates this opportunity to contribute to this Committee's considerations of pending legislation which seeks to establish effective Congressional oversight mechanisms.

At the outset, I would like to note NAM's continuing and active interest in the establishment of meaningful regulatory reform mechanisms. In our view, a meaningful mechanism is defined as one which, in concert with others, contributes to a common system addressing our overall objective of ensuring that federal regulatory activities are kept to the minimum necessary to correct perceived market imperfections which are not readily solvable through the natural pressures of our free market system.

The minimization of the federal regulatory presence is a matter which has received extensive review at all levels of government. It is clear that outdated, duplicative, and counterproductive rules and regulations are sapping the ability of our economy to produce, expand, compete and provide fuller employment. These are objectives which we believe to be in our best national interests.

To accomplish this reduction in the federal presence, NAM is urging the Congress to pass a three-part regulatory reform program. Part one concerns amendments to the Administrative

Procedures Act (APA) which promises to improve the methods employed by federal agencies in their exercise of Congressionally delegated legislative powers. Part two deals with the adoption of a series of oversight proposals which ensure effective oversight in all four branches. Part three calls for review and changes in substantive underlying statutes.

With continued diligence, the Congress will soon have an opportunity to vote on H.R. 746, the Regulatory Procedures Act of 1981 amending the APA. This legislation is now in markup before the full Judiciary Committee, and in its current form contains an ineffective legislative veto proposal, and contains no sunset provision. NAM believes that both are necessary to restore meaning to the Congressional oversight process and thereby facilitate the Congress in the establishment of national priorities in an age which recognizes the need for federal restraint. However, the NAM does not believe it necessary to include these programs in H.R. 746.

SUNSET PROVISION

To be effective, any Congressionally enacted sunset provision requires two components. The first is systematization, and the second is an action forcing mechanism. All federal regulatory programs should be enrolled on a calendar for systematic and periodic review. That calendar should be flexible enough to accommodate the addition of new programs. It should also be a permanent procedure given consequence through an effective action forcing mechanism.

Consistency with sunset's intent mandates the search for an action forcing mechanism which compels congressional scrutiny aimed at the elimination of unnecessary regulatory programs. Automatic termination accomplishes precisely that. Consequently, NAM advocates this particular mechanism and suggests that other suggested mechanisms are either inconsistent with a desire to streamline the Congressional oversight process -- such as expansive rule changes involving highly privileged discharged procedures -- or ineffective.

LEGISLATIVE VETO

Whereas sunset allows the periodic re-evaluation of federal regulatory progams, it does so only every ten years or so, and is program specific rather than regulation specific. There is a need for a mechanism which allows both a more timely, and more targeted response to the consequences of agency regulatory activism. In our judgment the legislative veto mechanism can perform this function, provided it is a government-wide program that does not include presidential involvement. In this regard, NAM has testified in the House in support of H.R. 1776, and on similar proposals now pending before the Senate.

The constitutionality of this mechanism is admittedly far from clear. NAM, however, believes that the Congress can enact a carefully crafted provision that will withstand judicial scrutiny. In this regard, we note a distinction between the Congressional veto of "quasi-judicial" actions vis-a-vis "quasi-legislative" activities. In our judgment, if an agency is promulgating rules and regulations pursuant to Congressionally delegated "legislative-type" powers, then the power of Congress to veto rules either exceeding the scope of the mandate, or at odds with other Congressional mandates or policies is consistent with the Constitution. The separation of powers function becomes an issue upon the exercise of congressional oversight powers of "non-legislative-type" agency actions. The NAM recognizes this "gray area" in the law when we are discussing the Congressional review of either an "executive-type" agency, or a "judicial type" agency action.

For example, we note Chadha v. INS, No. 77-1702, (9th Cir. 1980), which involves the constitutionality of a statute permitting a one-house Congressional veto of a decision by the attorney general to suspend the deportation of an alien. In pertinent part, a three-judge panel of the Ninth Circuit rejected several jurisdictional objections and held that the legislative veto interfered with the operation of both the executive and judicial branches of government by impairing and sharing the executive's power to administer and enforce the statute; and the judicial, by subjecting decisions to review without the constraints of precedent and the need to give articulated reasons for a particular decision.

Chadha v. INS has been granted certiorari by the Supreme Court. Although the court's decision will control subsequent challenges to the legislative veto of "quasi-judicial" actions, Chadha will not control, and is dispositive of the constitutionality of a Congressional veto of a "quasi-legislative" agency activity.

Together, meaningful sunset and legislative veto provide the Congress with an avenue to ensure that federal rules and regulations, both short-term and long-term, are consistent with both legislative intent as enacted, and with changing national priorities in an era of restraint in federal spending.

The Reagan economic program, as you know, has been warmly received by the business community. Among other features, this program is helping the country to focus our considerable collective talents on expanding our national capacity to produce, expand and compete. We therefore oppose proposals which detract from the crucial business of revitalizing our productive capacity. Hence, in the strongest terms, we urge the Committee to abandon provisions which promote investment uncertainty through the sunset of so-called tax expenditures.

With me today is Robert Ragland, who as Director of NAM's Regulatory Reform and Government Organization Committee, is prepared with an overview of NAM's position regarding the sunset of tax expenditures.

MR. RAGLAND

I would like to touch briefly upon why we would oppose any attempt to combine a "sunset" type of provision with the so-called "tax expenditure" concept. The latter concept first surfaced in the late 1960's and was formalized as part of the Congressional Budget Act of 1974, which defines tax expenditures as:

> "revenue losses attributable to provisions of the Federal tax law which allow a special exclusion,

> exemption or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability" (31 U.S.C. Section 1302(3))

Definitions essentially similar to the foregoing have in recent years been incorporated in various legislative proposals to impose "sunset" with regard to tax expenditures. NAM consistently has opposed these proposals and would oppose the inclusion of any such proposal in the legislation being considered by this subcommittee, for the following reasons:

1. The concept of a "tax expenditure" is too elusive and too subjective to be an appropriate basis for making or changing tax policy.
2. The potential expiration of investment-related tax provisions under a "sunset" scheme would adversely affect the planning of major capital expenditures.
3. "Sunset" for tax expenditures carries with it the potential that significant portions of the Federal tax laws would expire due to skillful procedural delay by a determined minority.

Definitional Problems

The previously-cited definition of "tax expenditures" is based upon a seriously flawed assumption, i.e., that it is possible to define a "normal" income tax structure, departures from which could then be characterized as "special" or "preferential". In the numerous articles and treaties which have dealt with this subject, there is in fact no generally accepted agreement on what constitutes a normal tax structure. One basic example should suffice to illustrate the difficulties inherent in this concept.

I would suggest that a logically defensible definition of a normal tax structure for individuals is one based upon the premise that all income is taxable at the flat rate of 50%. In such a system, taxing the lower brackets of income under a series of graduated rates below the 50% level (e.g., at "preferential" rates) would constitute a "tax expenditure" the cost of which should be shown in the annual Federal budget.

Of course, no such thing occurs. Likewise, the cost of allowing exemptions of $1,000 each to taxpayers and their dependents is not shown as a tax expenditure. This treatment of personal exemptions and of graduated rates below the top marginal rate probably owes more to political considerations than it does to rational analysis. More importantly, it illustrates the elusive and subjective nature of any attempt to define a "normal" tax structure or a "preferential" rate or a "special" exclusion, exemption, deduction or credit. To put it bluntly, "tax expenditures" exist largely in the eye of the beholder. Those who take the view that the government has a prior claim on all of a taxpayer's income will quite naturally have a more expansive view of what constitutes a tax expenditure than those who believe otherwise.

In short, the subjective political nature of any definition of a tax expenditure makes it impractical to attempt to treat this issue by broad generic classifications. While it is true that the Internal Revenue Code reflects numerous political judgments and determinations, these should continue to be added to or subtracted from the Code on a case-by-case basis.

Stability in Investment Planning

Many of the larger items on the "tax expenditure" lists are provisions related to capital investment -- accelerated cost recovery, the investment credit, capital gains treatment, Domestic International Sales Corporation (DISC) provisions and so-called "deferral" on foreign source income. Termination dates for these and related proposals would create uncertainty in the minds of investment planners, both in the major corporate board rooms and in the offices of the small manufacturers. While nearly all capital spending requires some advance planning, planning can be especially lengthy for projects such as building a new plant or significantly expanding or modernizing an existing facility.

While economic factors are the primary initiators of investment plans, tax policy also plays a significant role in the calculation of the return on investment and in the financing of the project. If the executive looks two years down the road and sees a termination date for accelerated cost recovery or the investment credit, the result can only be unsettling. Even if there is no prospect that Congress would repeal either one on a straight vote, there would be great concern that they could be allowed to terminate as much by accident as by design.

Indeed, in the Revenue Act of 1978, Congress specifically recognized the problems being caused by an unstable investment tax credit and made the credit permanent at 10%. Sunset for "tax expenditures" would not only undo that work, it would take several steps in the opposite direction.

Avoidance of Minority Rule

A crucial difference between the existing procedures for making or changing tax laws and sunset is that the latter approach carries with it the potential for minority rule. It is not difficult to imagine a situation where, through the skilled procedural maneuvering of a determined minority, an important tax provision was in effect repealed because it was not reenacted by a specified date. However, the expiration of a so-called "tax expenditure" is in reality a tax increase. NAM believes, therefore, that if taxes are to be raised this should be done by affirmative majority vote.

For the foregoing reasons, NAM would strongly oppose any legislation applying "sunset" to so-called "tax expenditures".

Mr. MOAKLEY. The final witness will be Mr. John Motley, deputy director, Federal Legislation, National Federation of Independent Business.

STATEMENT OF JOHN J. MOTLEY, DEPUTY DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. MOTLEY. Thank you, Mr. Chairman.

Mr. MOAKLEY. Is it Motley or Motely?

Mr. MOTLEY. It is Motley although there are many people who pronounce it Motely.

I have a written statement which has been prepared which I would like to submit for the record.

Mr. MOAKLEY. Without objection, your entire statement will appear in the record. [See p. 392.]

Mr. MOTLEY. Thank you, Mr. Chairman.

I would like to summarize my testimony in a briefer oral statement. First, I would like to thank you for this opportunity to appear here today on behalf of NFIB and its 500,000-member firms on the subject of congressional review of agency rulemaking.

I would apologize in advance to Mr. Beilenson for not submitting a series of examples of where this particular type of legislation could be helpful to small business or problems it might overcome in the small business area. But I assure you we will be more than happy to submit as many examples as you feel would be appropriate for your record from our files if you would like to have it.

Mr. MOAKLEY. We would appreciate that.

Mr. BEILENSON. It would be helpful. Obviously I think it is fair to say most of us are especially concerned about small business where in fact you are dealing with people without resources who often are at a great disadvantage, perhaps out of business, if some terribly unwise regulation is promulgated.

Dow Chemical could probably take care of itself but obviously small businesses may not be able to.

[The material referred to may be found in the subcommittee files.]

Mr. MOAKLEY. We have heard the same horror cases over and over again and we understand that. But we would like to know if there might be some things that might really shock us, that are just so simple we don't even see them.

Mr. MOTLEY. I would be happy to search through our files and pull those cases which we think are appropriate and send them to the committee for your record.

Mr. FROST. If I might, Mr. Chairman, perhaps you might want to look at the hearing record which has been published by the committee of our field hearing, and perhaps comment on some of the things that were brought out in that hearing.

Mr. MOAKLEY. Do you have a copy of the field hearings?

Mr. MOTLEY. I don't believe I do.

Mr. MOAKLEY. The gentleman will provide you with one.

Mr. MOTLEY. Thank you very much.

On the subject OSHA brought up previously, before I get into my statement, we have not had an OSHA authorization bill on the floor of the House except under suspension of the rules since it was originally passed in 1970.

The reason for this is that organized labor has never been sure that they had the votes to prevent a rewrite of the statute on the floor. So any of the bills we have had up, outside of appropriations bills, have been under suspension of the rules, preventing a veto provision from being attached to it.

I think you are probably all aware that the positions of the NFIB are set by vote of its membership in polls which we conduct every 6 weeks.

We did poll the one-House legislative veto issue version of H.R. 1776, 2 or 3 years ago, and at that time NFIB members voted 76 percent in favor of this legislative concept, 21 percent opposed with only 3 percent being undecided.

So the official position of the organization is to support one-House legislative veto. Since that is a fairly strong position we feel free to support any of the weaker variations of this bill as it moves through the legislative process.

Legislative veto itself has long been part of NFIB's three-part small business regulatory reform package. That package, which was outlined in the beginning of the last Congress consisted of regulatory flexibility for small business, equal access to justice, and the legislative veto proposal.

We felt that it made a complete package, regulatory flexibility, applying to the drafting and promulgation process itself, legislative veto applying to the review process. And if the small businessperson could not get redress, then they always were able to go to the courts to argue their case, where if they were found to be correct the Government would reimburse them for their court costs and lawyers fees. Both regulatory flexibility and equal access to justice were enacted in the closing days of the 96th Congress and we are very hopeful they will be effective.

Therefore, the only part of the three-part program that is still on the books for us to complete our regulatory program for small business is legislative veto. The main reason we got involved in this outside of the outcry from members across the country who are impacted by regulation, is the financing problems small business has.

I think everybody is pretty much in agreement that the expense of regulation tends to fall disproportionately on smaller firms simply because they have less resources.

There is a very limited amount of capital available to them, and if this capital is taken up in complying with these regulations, they are not able to put it into more productive uses.

Second, in the last couple of years we have had a tremendously high cost of money. And most small firms tend to finance these type of improvements through debt financing. They are not going to go into the bond market and sell bonds. They are not going to go into any sort of public market to finance these types of regulatory improvements.

They are going to their local banker and they are going to get charged not prime, but generally several points over prime.

So it is tremendously expensive for them to comply with some of these regulations.

In complying they are not able to pass on 100 percent of the cost. I don't think any business can pass on 100 percent of the increase in cost due to these regulatory changes. But where small business is generally most impacted here is that they tend not to be a price setter, they tend to be price takers. They are in competition with much larger firms.

If they are unable to pass on less of the costs than their larger competitors are, it essentially puts them in a much more difficult competitive situation. So those are the primary financial and economic reasons why we have been concerned about the tremendous growth in regulation that has occurred over the last decade.

In addition, I think it is fairly common knowledge that small firms don't have either the resources or the inclination to participate in the regulatory process. They don't read the Federal Register. They generally tend to stay away from anything in which the Government is connected.

They also have a great deal more faith in their elected Representatives than they do in the Federal bureaucracy. They tend to feel that they have a reliable friend on which they can call if they have a problem, but, if they walk into an agency they feel they get nothing but a run-around. Whether this is true or not, it is an accurate reflection of their feelings.

Last but not least, I think I can say after dealing with them for the last 11 years that most small business people tend to feel the Congress has a responsibility for reviewing the laws that it passes. They feel that it is only proper procedure for the Congress to undertake. Taken together these beliefs make the concept of a legislative veto so tremendously attractive to a great many small businessmen.

I tend to give two or three speeches a month across the country to various different small business groups. Whenever we get into regulatory matters this is the one which tends to draw the most support and interest. Last but not least, in closing I would like to say that if you would like at least one very broad example of where this might have helped, I would go back again to the favorite whipping boy on that, and that is OSHA.

When the Occupational Safety and Health Act was first passed the Labor Department was under tremendous pressure to get regulation on the books very quickly. What they did was adopt the consensus standards of ANSI, the American National Standards Institute, en masse. And this is where you had all of these ridiculous examples such as no ice cubes in the drinking water and everything else like that coming from—because a lot of these standards that were in the ANSI standard guides were simply outmoded or outdated. But they were still adopted en masse as part of the regulations.

I think it is an excellent example if you had congressional review and veto at that time of something by which we all could have avoided a lot of time, trouble, and pain over the last 10 years.

Mr. **Moakley**. Is there actually a regulation you can't have ice cubes in drinking water?

Mr. **Motley**. Not any longer. I believe that one was pulled off the books about 3 years ago.

Mr. MOAKLEY. What was the purpose of the regulation in the first place?

Mr. MOTLEY. Because of bacteria in the ice, I believe it originated in those days when we didn't have adequate refrigeration.

Mr. MOAKLEY. It was adequate enough to freeze the ice.

Mr. BEILENSON. We didn't have the agency in those days either.

Mr. MOTLEY. I am afraid I really can't comment on that scientifically, Mr. Chairman. That really concludes my statement. I will be glad to answer any questions if I can.

Mr. MOAKLEY. Actually, tell me, do you have any experiences that come to mind without going through your files where small businesses were forced out of business because of any regulations?

Mr. MOTLEY. I can think of a series of cases when I first started working for NFIB back in the early 1970's when Senator Allen Bible was chairman of the Senate Small Business Committee.

In the late sixties Congress passed a series of pure food laws, the Wholesome Meat Act and Egg Acts, et cetera.

In the case of meat when the agency promulgated the regulations, the Department of Agriculture, within 3 months they put something like 500 or 600 small freezer locker plants across the Midwest out of business immediately.

I am sure the committee can go back into the records of the Small Business Committee and find that, because we had a specific piece of legislation which was passed authorizing the Small Business Administration to grant loans at reduced rates of interest to firms who were affected by this type of regulation.

That is the one instance that I recall.

Mr. MOAKLEY. Was that because of a health situation?

Mr. MOTLEY. Well, it was simply, I think, they needed to meet certain standards as far as their refrigeration is concerned in the keeping of meat. And these small plants simply could not afford to meet the standards that were set by the Department of Agriculture.

Mr. BEILENSON. That was probably the purpose of the act in the first place, to put out of business people who couldn't meet them.

Mr. MOAKLEY. Were these rules enacted by some bureaucrat who was overzealous in his attempt to clean up the industry or were those rules actually needed?

Mr. MOTLEY. I believe, and again I would have to refer to the committee hearing because it was 11 years ago, that what was found was that the people who wrote the regulations simply were not aware that small firms could not go out and comply with this regulation, that these small freezer/locker plants could not go out and comply immediately.

Therefore, I think the committee's conclusion was that if you had had something like RegFlex, or there was a phase-in period or some other mechanism that would allow them to come up to compliance levels over a period of time then these firms wouldn't have gone out of existence.

Mr. MOAKLEY. Have you looked at H.R. 1 which happens to be the select committee approach to the legislative veto, which I think would be better for small business? The select committee would provide a forum for them to discuss their problems rather than having an expensive, highly paid lobbyist walking the corridors of the Congress to try to get people to sign a discharge petition.

Mr. **Motley**. I, myself, have not taken a close look at H.R. 1, Mr. Chairman. I believe our legislative counsel has and I would be more than happy to supply our feelings on it, again for the record, if you would like.

Mr. **Moakley**. Good.

[The material referred to by Mr. Motley may be found in the subcommittee files.]

Mr. **Moakley**. On a little different matter, probably because 80 percent of the businesses in New England are small businesses and because I have a soft spot in my heart for small businesses, could you tell me how many small businesses have gone out of business lately not because of excessive regulations but because of the high interest rates?

Mr. **Motley**. The rate of bankruptcy, and there is not a direct correlation between rate of bankruptcy and high interest rates because there are other things that are happening in the economy, but the rate of bankruptcy has doubled in the last 6 months, and shows every indication, I believe, of going up even farther.

If I am not mistaken, there were approximately in a 6-month period ending with the third quarter of this year, 10,000 bankruptcies within the small business sector.

I do have the figures, and again I can supply those to the committee for the record. But there is no doubt that high interest rates right now are the No. 1 problem which are facing small firms.

NFIB does a Quarterly Economic Report on Small Business. That report has been in existence for 8 years. It is done by a group of economists across the country who analyze the data we collect. Inflation has been the No. 1 problem facing these firms for the last 7¾ years.

In the last quarter interest rates vaulted from No. 4, where it had been for a long, long time, up to No. 1, and No. 1 by a long margin.

So it is a very, very serious problem out there now.

Mr. **Moakley**. Thank you. Mr. Beilenson.

Mr. **Beilenson**. Thank you.

Your testimony, sir, was helpful. We appreciate it. I want to comment on one thing, not terribly apropos, but you mentioned in passing one of your legislative ballots, which I find interesting and read—I think we are sent the results.

Mr. **Motley**. Yes, you are.

Mr. **Beilenson**. Actually most of the results seem to be 96 to 2 or 98 to 1—kind of like elections in the Soviet Union—but I was interested with respect to it, I think you need help in rephrasing some of your questions.

I mean, even I would have answered them in the same way some of these folks did if I were confronted by those questions. I was interested that the response on legislative veto was only 76 to 21. If you phrased the question properly you could have had a 96-percent response. You ought to write that question the same way, as the others.

Mr. **Motley**. Mr. Beilenson, I do understand what you are saying. In any process like this, of course, there is always a chance that a given question can be the wrong question or phrased improperly, it can be slanted.

The only thing I can say is that we do try very hard to make sure that the arguments are presented fairly. We have gone to various different Members of Congress on both sides of an issue. I believe Mr. Levitas wrote the pro on this way back when it was polled.

Mr. BEILENSON. I am surprised he didn't do better.

Mr. MOTLEY. The Secretary of the Transportation wrote arguments in favor of the deregulation of the trucking industry, while members of the trucking industry wrote those against.

If I did supply you the national results for the last 3 or 4 years of how NFIB members were voting I don't think you would find more than maybe a half-dozen issues in which there was a 90-percent vote in favor or against anything.

Mr. BEILENSON. Maybe it is just the members in my own district. I guess we get it broken down by district as well.

Mr. MOTLEY. Yes.

Mr. BEILENSON. They may have been of the same mind. Actually we only have two or three members there, maybe that is why.

Mr. MOAKLEY. They are all in the same family.

Mr. BEILENSON. Yes.

Mr. MOTLEY. Two recent ones we had, deregulation of natural gas, the membership is split right down the middle on. Also, the one we just finished polling—whether to continue the industrial revenue bond program—the membership was split right down the middle again.

In that type of situation we don't take a position.

Mr. MOAKLEY. Tell me, getting to Congressman Beilenson's question, when you do have some questions, does the leadership of the NFIB, say, for instance, if you or your fellow officers had a position on something, would you try to get your membership to follow you, or do you just educate them as broadly as you can on both sides?

Mr. MOTLEY. If you met the director of our research department and talked with him for 15 minutes I think you could probably answer that question yourself. He doesn't particularly care for anybody within the organization tampering with the research his people do on both sides of the issue.

Mr. MOAKLEY. I don't say it is tampering. Maybe someone wants the organization to take a certain position and may feel that a large portion of the membership does not have enough time to devote to the intense study required to make that judgment. So whoever is in charge has made up his mind for the membership.

Mr. MOTLEY. The tendency tends to be to let the membership tell us what they want rather than us try to educate the membership.

I will give you one example and I think it is a fairly classic one. In our past March board meeting the Washington staff, the research and legislative department staffs, went out prepared to argue a position on the impending tax reductions.

We began arguing that position, and our board members told us very frankly that we had no business arguing it. They want to know, what did the membership feel about it. So even though we had polled most of the tax issues in the preceding years, we went out to the membership and took the 7, well, it was actually 11, most commonly referred to small business tax breaks and asked the membership to prioritize them for us.

The results of the survey became the rather strict guidelines we followed throughout the tax debate.

Mr. **Moakley**. As a Congressman, my colleagues and I, may, because of information we are privy to, feel a certain way on a bill. The greater number of our constituents may not feel that way. Many times we go back and hold seminars to educate them, to show them the information we have which we feel may not be readily available to them.

Sometimes we are stuck. Many times if we come out strong on a side, people feel that we are down there—we know what we are doing and so they will listen to us when it comes to this type of thing.

I was just wondering if that kind of thing was going on in your organization?

Mr. **Motley**. At several different levels it does. But if we were to err on either side, we would always be erring on the side of what the opinion of the member was. There isn't any doubt that the overall membership of NFIB tend to be fiscally conservative.

You know, I could probably tell you where they are going to come down to 9 out of 10 issues. But they always tend to surprise us. In our newsletters, in the publications that we do, in the State meetings that we hold, we do go through that process of explaining the issues and trying to provide them, especially in the tax area which is so, so confusing, with the types of data and information they need to make an intelligent decision.

Mr. **Frost**. I have, since he is here, I have a question, too, unrelated to the subject at hand. They give an award each year to friends of small business, something like that.

Mr. **Motley**. Guardian of Small Business.

Mr. **Frost**. Were any of the 11 Democratic members of the Rules Committee recipients of that during the last Congress; do you know offhand?

Mr. **Motley**. During the last Congress.

Mr. **Frost**. Ninety-sixth Congress.

Mr. **Beilenson**. Mr. Moakley's a friend of small business. He has a warm spot in his heart for them and Mr. Frost——

Mr. **Motley**. I believe Mr. Derrick was a recipient.

Mr. **Moakley**. Sometimes warm spots don't transmit new votes, though.

Mr. **Motley**. That is exactly true, Mr. Moakley. That is one of the reasons we instituted the award.

Mr. **Moakley**. Do you have any warm heart awards?

Mr. **Motley**. We gave one to Representative Conte years ago.

Mr. **Frost**. Did you say Mr. Derrick was one of the recipients?

Mr. **Motley**. Yes, and I believe that sometime in the past Mr. Gillis Long had also received an award.

Mr. **Beilenson**. We sit right here with Mr. Derrick and he is for small business. And Mr. Frost does. Mr. Moakley for a fact does.

Mr. **Motley**. The Texas delegation does very well.

Mr. **Moakley**. Could I ask the gentleman from Texas a question?

Mr. **Frost**. Sure.

Mr. **Moakley**. Why would you ask that question?

Mr. FROST. I have always wondered that.

Mr. MOAKLEY. You are not looking for a small business award, are you?

Mr. FROST. No, I am just curious. He is here to testify before us. I was wondering whether our committee was in, somewhat in sympathy with the positions of his organization. I know we are individually.

But I have a feeling that cumulatively we have to stand on our record.

Mr. MOAKLEY. Thank you very much for testifying before the committee, Mr. Motley. We would appreciate the other information some of the members have asked for. You will be supplied with some of the hearings we have had. We don't expect you to read it all. You can probably zero in on spots of interest.

Mr. MOTLEY. Thank you, Mr. Chairman, I enjoyed it very much.

Mr. MOAKLEY. Thank you.

[Mr. Motley's prepared statement follows:]

NFIB National Federation of Independent Business

STATEMENT OF

JOHN J. MOTLEY
Deputy Director of Federal Legislation

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Subcommittee on Rules of the House
House Committee on Rules

Subject: Consideration of Legislation Providing for Congressional Review of Agency Rulemaking

Date: November 18, 1981

The National Federation of Independent Business on behalf of its one-half million small and independent business members appreciates the opportunity to present its view on congressional review of agency rulemaking.

To this end, we have used as a focus H.R.1776, introduced by Rep. Levitas (D.GA) creating procedures for congressional review of agency rules.

The economic burden of excessive regulation is a matter of great concern to NFIB and its member firms. First, compliance by small firms is marginally more expensive than for large firms, which diverts scarce capital away from more productive investments in plant, equipment and supplies. Second, much of this compliance must be financed by borrowing, which in today's economy is extremely expensive and could push many highly-leverage small businesses to the wall. And third, while these added costs must be passed on to the consumer, the total incremental increase can rarely be passed on completely, resulting in reduced profits and a weakened competitive position.

Excessive regulation also imposes an additional burden on small firms that is far less obvious. They do not have the time or the resources to participate in the regulatory process and are unable to protect themselves from devastating regulatory mistakes. The hearing records of the House and Senate Small Business Committees are full of accounts where well intentioned regulations had the unintended side effect of closing the doors of unsuspecting and unprepared small firms. These businesses do not read the Federal Register or have the time or the money to get involved in regulatory proceedings.

The bottom line for them is quite simple: they do not possess the economic resources to comply with, participate in or litigate against the myriad of regulations they are legally bound to observe on a regular basis. For this reason small firms are disproportionately burdened by the compliance costs of regulation.

The 1970's have been aptly described by expert observers of the federal administrative process as the "era of rulemaking." Congress delegated inordinate authority to federal agencies in order to carry out the mandate of the regulatory legislation that had been enacted. At the same time congress seldom exercised the oversight that has been a long neglected yet essential function of the legislative branch. The unfortunate result at times has been regulations drafted by non-elected, non-responsive bureaucrats who have effectively "legislated" without regard for circumstances that would make compliance unnecessary, economically prohibitive, or impossible.

It is no wonder that since the inception of the NFIB Quarterly Economic Report survey in 1974 that the NFIB membership has consistently voted "government regulation" in its list of top four concerns of small business. And as a result, NFIB in ever-increasing intensity has called for the elimination of some of the misguided approaches to regulation that have occurred.

NFIB regards the Legislative Veto Proposal introduced by Rep. Levitas and co-sponsored by 232 other House members to be among the simplest and most direct methods of introducing accountability into the Federal regulatory structure. By setting forth an on-going procedure whereby Congress may review and if necessary reject agency rules, this legislation will provide Congress with a valuable tool for assuring that Executive Branch and independent agency rules are a true expression of Congressional intent.

Neigher NFIB nor any other responsible spokesman can make a case that regulation is never appropriate. There are some areas, especially in the health and safety area, which may require a level of outside involvement. By the same token, every time the government does attempt to get involved in regulating the conduct of citizens or institutions, it must carry the burden of proving that the regulation proposed is fully justified. This is all the more true considering the breadth of the regulatory burden on business. The Landmark Study of Professor Murray Weidenbaum, formerly of the Center for the Study of American Business at Washington University in St. Louis, and now Chairman of the Council of Economic Advisors, demonstrates that regulatory costs imposed by Federal Government on the private sector alone amounted to approximately $103 billion for fiscal year 1979. This figure is approximately equal to one-fifth of the Federal budget but is not subject to any systematic procedure of Congressional scrutiny. The Legislative Veto will insure that the Congress has an opportunity to examine costly new rules and to determine whether the expenses they impose on the public are warranted.

There is little question that in recent decades Congress has increasingly given up much control over the "Making of Law" to the regulatory agencies. This loss of Constitutional Congressional Authority has occurred through the passage of legislation that calls for the "promulgation" of rules and regulations that supposedly will cure some societal deficiency. NFIB and its membership have always and inalterably supported the concept of returning to the elected representatives of the people to control over governmental decision making. For the small business person the Member of Congress is oftentimes the last resort before either facing severe penalties for non-compliance or succumbing to costly mandates. The legislation which is presently being considered definitely establishes that it is the Congress that will be responsible for the exercise of Delegated Lawmaking Authority.

There has been a substantial amount of controversy over the question of the constitutionality of the Legislative Veto. NFIB feels that while there may be some ambiguity as to the ultimate constitutional propriety of various proposals, Congress, in the face of inchoate constitutional lines of demarcation, can proceed with the expectation that the law may be subjected to judicial challenge. It is a noble burden that NFIB respectfully calls on Congress to bear. And it is one which will go a long way in convincing the small businessmen and women of America that they still have an effective voice in this Great Democracy.

Mr. **Moakley**. Without objection the Chair wishes to place in the record at this point statements submitted from the American Gas Association and the American Textile Manufacturers Institute.

[The statements follow:]

STATEMENT OF
THE AMERICAN GAS ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON RULES OF THE HOUSE
OF THE
COMMITTEE ON RULES
U.S. HOUSE OF REPRESENTATIVES
ON H.R. 1
(MOAKLEY, D-MA)
THE "REGULATION REFORM ACT OF 1981"
ON H.R. 1776
(LEVITAS, D-GA)
THE "ADMINISTRATIVE RULE MAKING REFORM ACT"
AND ON H.R. 4838
(LOTT, R-MS)
THE "REGULATORY CONTROL ACT OF 1981"
November 30, 1981

Introduction:

The American Gas Association (A.G.A.) submits the following statement on H.R. 1 (Moakley, D-MA), the "Regulation Reform Act of 1981", on H.R. 1776 (Levitas, D-GA), the "Administrative Rule Making Reform Act", and on H.R. 4838 (Lott, R-MS), the "Regulatory Control Act of 1981." A.G.A. is a national trade association representing nearly 300 natural gas transmission and distribution companies serving over 160 million consumers in all 50 states. A.G.A. member companies account for nearly 85% of the nation's total annual gas utility sales.

Regulatory reform is an issue in which the natural gas industry is extremely interested. For example, the siting, construction, and licensing of major new energy facilities are governed by several federal agencies as well as state and local governments. Importation of natural gas is governed by the Federal Energy Regulatory Commission (FERC) and by the Economic Regulatory Administration (ERA) within the Department of Energy (DOE). Furthermore, pipeline curtailments are governed jointly by FERC and ERA. Pipeline safety is governed by the regulations of both the Department of Transportation (DOT) and by the Occupational Safety and Health Administration (OSHA). Finally, there is a myriad of federal regulations governing the energy conservation activities of local distribution (utility) companies. For these reasons, the natural gas industry is keenly interested in any legislation which affects the regulatory process.

A.G.A.'s statement will focus upon the following crucial issues:

A. General Comments on the Legislative Veto Mechanism

- A.G.A. opposes the legislative veto provisions contained in these bills. Legislative review of rulemakings will only serve to slow down an already cumbersome administrative process. Congress can solve any concerns it has with agency rulemaking by drafting enabling legislation which gives agencies adequate guidance in the promulgation of rules. While a legislative veto might be an appropriate mechanism in certain specific and limited regulatory applications, A.G.A. does not believe this mechanism is well-suited for across-the-board application to the regulatory process.

B. Specific Problems with Each Bill

- The "Committee on Regulatory Affairs" would be empowered to review all proposed and final rules and make recommendations to jurisdictional standing committees with respect to these regulatory activities. The Committee would also be authorized to report a joint resolution of disapproval for consideration by the full House. Thus, H.R. 1 would have inappropriate across-the-board ramifications for the regulatory process.

- A.G.A. opposes the definition of "rule" contained in H.R. 1776. The proposed definition would require that virtually all rules be subjected to the legislative veto mechanism. This overly-broad definition would require Congressional review of such case-specific regulatory proceedings as pipeline rate cases and licensing or certification proceedings. These matters should not be the subject of Congressional review.

- H.R. 4838 would -- in effect -- make Congress the federal rulemaking authority. To bolster its generic legislative veto provision, H.R. 4838 explicitly provides that any rule subject to legislative review is merely "a recommendation to Congress." A.G.A. believes that this provision represents a dangerous incursion into the regulatory process.

A. General Comments on the Legislative Veto Mechansim

A.G.A. opposes the application of a legislative veto to all agencies as provided in these legislative proposals. While the legislative veto may have application in some specific and limited instances,[1] we do not believe it appropriate to require all rules to be submitted to Congress for review. Legislative review of major rulemakings will only serve to further encumber an already cumbersome process.

When Congress fails to give an agency specific guidance in enabling legislation, the result is an inappropriate delegation of legislative authority to an administrative agency. By adopting an across-the board legislative veto, Congress is saying -- in essence -- it cannot make a decision on a specific subject in the first instance. Therefore, Congress abdicates its primary decision-making responsibilities in favor of a "second-look" via the legislative veto mechanism. While we take no general position on the constitutionality of legislative vetoes, we believe that Congress must be aware that an across-the-board legislative veto will be challenged, and its efficacy will be determined by the courts. The only result will be further delay in the regulatory process. As one observer noted:

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[1] At this time, A.G.A. is opposing a constitutional challenge to the legislative veto provision in §507 of the Natural Gas Policy Act regarding Phase II of incremental pricing (Consumer Energy Council of America v. FERC, D.C. Cir. Docket Nos. 80-2184 and 80-2312). This is one specific and limited instance in which we believe the legislative veto has appropriate application, because of the extraordinary nature of the problem -- how to assure this country's energy future.

> Another deleterious effect of the legitimation of the legislative veto will be an increase in that very practice of congressional delegation of vague and standardless rulemaking authority which has placed us in our current predicament. . . . [T]he delusion that it would be able to control the agencies through the legislative veto will render Congress all the more ready to continue and expand the transfer of basic policy decisions to the agencies. . . . By enabling Congress to have its way -- that is, effectively to control the outcome -- without affirmatively accepting the responsibility in a record vote, the legislative veto is an egregious subversion of the democratic process.[2]

Thus, an omnibus legislative veto could actually increase the number of unreasonable major rules and expand the effective authority of federal agencies. Consequently, A.G.A. is convinced that an omnibus legislative veto provision is ill-advised and would not solve any of the problems with the regulatory process which have prompted the approaches taken by this legislation.

One specific problem we have with H.R. 4838's legislative veto provision is in proposed Section 805, which provides that Congressional inaction regarding or rejecting the joint disapproval resolution is not to be deemed an approval of the regulation. This subsection provides the strongest argument in favor of deleting the comprehensive legislative veto: Why should Congress be involved at all if its only involvement is to veto regulations? This provision abrogates the entire philosophy behind a generic legislative veto. In order to make a decision as to how to vote on the regulation, Congress must review the entire rulemaking.

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[2] Scalia, Antonin, The Legislative Veto: A False Remedy for System Overload, 3 REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY 19 (November/December 1979) at 25.

file. If review by Congress is to be meaningful at all, then Congressional failure to take the affirmative action of vetoing the rule must be deemed an affirmation of the rule's statutory integrity. This provision also creates confusion as to how Congressional intent is to be interpreted. In the case of the vast number of rules which Congress does not veto, it will become more difficult for affected parties to mount a successful challenge in the courts.

B. Specific Problems with Each Bill:

H.R. 1

The legislative veto provisions in Title IV of H.R. 1 allow the Committee on Regulatory Affairs to recommend both the disapproval of proposed regulations and repeal of existing regulations to the whole House through a joint resolution. Other aspects of Title IV of H.R. 1[3] establish procedures in the House for the operation of the legislative veto mechanism once a proposed rule has been referred to the House pursuant to a specific statutory mandate. A.G.A. believes that this latter aspect of H.R. 1 is a responsible way to deal with the legislative veto and should be adopted in lieu of generic, across-the-board application of the legislative veto. However, we are concerned that Title IV imposes no time limits for Congressional consideration of rules either in the across-the-board examination of agency rules or in the case of a specific statutory mandate. This will lead to extreme and needless uncertainty, particularly in the case of proposed rules.

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[3] *See*, for example, Section 407(b)(1).

H.R. 1776

Section 2(a) of H.R. 1776 would amend Section 551(4) of the Administrative Procedure Act [4] to change its definition of "rule" as follows:

> (4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency and includes any amendment, revision or repeal of such a statement;

This definition is so broad that it could result in the review by Congress of nearly every agency activity. This would surely cover more agency activity than Congress could ever have time to review.

A.G.A. is specifically concerned that Congress might ultimately interpret this definition, even more broadly than stated now, to include agency activities pertaining to specific corporations. Certainly, the term "general applicability" can be argued to place some limitation on the application of the legislative veto mechanism. However, A.G.A. believes that H.R. 1776's proposed definition of "rule" should be amended to exempt specifically the following from application of the legislative veto mechanism:

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[4] 5 U.S.C. §550.

> rules of particular applicability respecting rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices bearing on any of the foregoing.

This amendment (which tracks the APA and is similar to the H.R. 746 [Danielson, D-CA] definition) would significantly circumscribe Congressional review and would limit application of the legislative veto to agency actions which are not directed toward specific individuals and/or case situations.

Another aspect of H.R. 1776 that is of concern to A.G.A. is the provision in proposed §603 for a "resolution for reconsideration". Congress can use this procedure in lieu of vetoing a rule to require that the agency reconsider its rule and either withdraw or repromulgate it. This procedure -- like the legislative veto -- is inappropriate for across-the-board application and can only serve to lengthen the regulatory process. We do not believe that this procedure should be contemplated -- much less enacted -- under the guise of true regulatory reform.

H.R. 4838

This bill would require both Houses of Congress to disapprove an agency rule[5] in order for the rule to be vetoed. While we believe that any legislative veto mechanism adopted by Congress should be strictly circumscribed, it should in some way recognize -- either explicitly or implicitly -- the fact that constitutionally established regulatory bodies bear the legal authority to promulgate rules, not the Congress. As we have stated, generic application of the legislative veto process subverts the distinction between Congressional functions and regulatory functions. H.R. 4838 would further blur this distinction by providing in Section 802(a)(2) that:

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[5] H.R. 4838's definition of rule is the most detailed of all three bills.

> Notwithstanding any other provision of law, any rule subject to this section shall be considered a recommendation of the agency to the Congress unless such rule has become effective in accordance with this section. [Emphasis added.]

If regulatory agencies are relegated to providing Congress with "recommendations", then it appears that it is Congress who is promulgating rules and not the agencies (which are by statute charged with this authority). A.G.A. strongly suggests that Section 802(a)(2) be deleted from any final legislation.

CONCLUSION

A.G.A. appreciates the opportunity to present our views on H.R. 1, H.R. 1776 and H.R. 4838. We sincerely urge Congress to reexamine this legislation in light of the comments we have made. A.G.A. firmly believes that an omnibus legislative veto approach to regulatory reform is inappropriate and should not be viewed as a panacea for solving the problems created by a complicated and overlapping bureaucracy. True regulatory reform can only be accomplished in a meaningful way by addressing the organic statutes which have created the vague agency mandates. While we realize that this is going to be a tedious, difficult task, we believe it is an absolutely essential process. A.G.A. will be pleased to work with this Subcommittee and the Congress on this matter.

STATEMENT OF
AMERICAN TEXTILE MANUFACTURERS INSTITUTE
BEFORE THE
HOUSE RULES SUBCOMMITTEE ON RULES OF THE HOUSE

November 19, 1981

Mr. Chairman, the American Textile Manufacturers Institute, Inc. (ATMI) appreciates this opportunity to submit testimony in support of congressional veto legislation.

ATMI is the national, central trade association which represents spinners, weavers, knitters, tufters, dyers and finishers that manufacture eighty-five percent of the U.S. textile production. As America's oldest manufacturing industry, it has been subjected to countless burdensome and complex regulations imposed by our federal government, specifically the executive and independent agencies.

Our government belongs to the people of this nation and it should be responsive to them. ATMI contends, therefore, that the laws and regulations emanating from it should also be accountable to the American people. In many instances, however, the executive branch of our government has overstepped its prescribed responsibilities and its authority.

ATMI advocates legislative action which would restore to Congress and the American people some form of control over executive and independent agency rulemaking insofar as promulgated rules are concerned. The problem is one of an unaccountable and unresponsive government that entwines itself in an autonomous ball of red tape and bureaucratic excess. Repeatedly the administrative agencies have assumed the responsibilities of Congress by issuing regulations which violate congressional intent. Legislative efforts are distorted and thwarted when the implementing rules and regulations are eventually published. These promulgated rules are often arbitrary, capricious, oppressive and go clearly beyond the intent of Congress at the time authorizing measures were enacted.

Furthermore, when administrative rules govern such a wide range of human activity, the potential for deprivation of liberty and property without due process of law rises concomitantly. Due process requires notice to persons affected by a law and the opportunity for those persons to be heard. It requires that the government act fairly and rationally, and not arbitrarily. Much to the public's chagrin, however, executive and independent agencies, in many instances, have acted unfairly and arbitrarily.

The means to rectify agency actions are not always the most expedient nor effective. For example, ATMI strongly supports judicial review of agency decisions. Nevertheless, depending upon a particular case, it can provide a costly and limited vehicle of recourse when dealing with rulemaking proceedings. The one disadvantage of relegating review of administrative rules to the courts is that the individual adversely affected by the rule must incur the costs of litigation coupled with the delay inherent in the judicial process.

Another recourse is the avenue of repeal or modification of a regulation via the introduction of a legislative measure in Congress. This process, too, can be quite time-consuming, costly and ultimately the potential prey of a presidential veto. Additionally, the burden placed on committees to control excessive rules and regulations can be extensive and also ineffective.

Therefore, the need for another safeguard against burdensome and increasingly costly regulations is imminent and one in which ATMI feels Congress should seriously consider.

This safeguard, namely, legislative veto of administrative rules and regulations, would have a three-fold effect. First, it would make administrative agencies more responsive to the public, and to congressional intent. This can be accomplished by instilling the realization within each agency that it cannot promulgate regulations without impunity. Essentially, the agencies would be cognizant of the notion that their "every move" is under scrutiny. Each agency would be consciously cautious because the implementation of serious and unnecessary regulations could trigger immediate congressional gunfire. This in turn will assure more carefully drafted regulations in addition to more attention focused on public comments. Thirdly, it will force Congress to draft legislation without delegating such broad and innocuous authority. Furthermore, agencies would not be given "carte blanche" in determining new regulations or modifying established ones.

In conclusion, ATMI believes that the need for an additional safeguard against regulatory excesses is imperative in order to restore responsibility to the bureaucracy and the rulemaking process.

Mr. MOAKLEY. The subcommittee will now adjourn.

[Whereupon, at 4 p.m., the subcommittee was adjourned.]

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